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No. 134

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM C. GREENE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Appeals (R. 131–139) is reported at 246 F. 2d 677.

JURISDICTION

The judgment of the Court of Appeals was entered on May 16, 1957 (R. 140). On June 10, 1957, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including July 5, 1957 (R. 141) and the petition was filed on that date. The petition was granted on June 30, 1958 (R. 141–142). 357 U. S. 934. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether one sale of narcotics may constitute three separately punishable offenses under the Narcotic Drug Import and Export Act, the Internal Revenue Code's stamped package requirement, and the Internal Revenue Code's requirement of a written order form.

2. Whether a court of appeals, upon finding valid sufficient counts to support the sentence imposed, may affirm the conviction without passing on all counts.

STATUTES INVOLVED

18 U. S. C. 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The Narcotic Drugs Import and Export Act, Sec. 2 (c), 65 Stat. 767 (21 U. S. C. 174), as it read at the time the crimes charged were alleged to have been committed,[1] provided in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates

[1] The punishment section was amended by the Narcotic Control Act of 1956, 70 Stat. 567, 570.

the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. * * *

Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

The Internal Revenue Code of 1954, Sections 4704 (a), 4705 (a), and 7237 (a), 68A Stat. 550–551, 860, as amended, 69 Stat. 3 (26 U. S. C., Supp. III, 4704 (a), 4705 (a), 7237 (a)), read in part as follows:

SEC. 4704. *Packages.*

(a) *General Requirement.*

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

SEC. 4705. *Order Forms.*

(a) *General Requirement.*

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the

person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

SEC. 7237. *Violation of Laws Relating to Narcotic Drugs and to Marihuana.*

(a) *Violation of Law Relating to Opium and Coca Leaves and Marihuana.*

Whoever commits an offense or conspires to commit an offense described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided [such as sections 4704 (a) and 4705 (a), *supra*], shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years. * * *[2]

STATEMENT

Petitioner was convicted in the United States District Court for the District of Columbia on fifteen counts charging various narcotic offenses (R. 123). The date and substance of each violation are set out in the following table (R. 1–9):

[2] The term of imprisonment was amended by the Narcotic Control Act of 1956, 70 Stat. 567.

Count	Date	Violation
1	Dec. 11, 1954 to Feb. 2, 1955	Conspired to violate 26 U. S. C. 4704 (a) and 4705 (a) and 21 U. S. C. 174
2	Jan. 14, 1955	Concealed and sold imported heroin—21 U. S. C. 174
3	Jan. 18, 1955	Concealed and sold imported heroin—21 U. S. C. 174
4	Jan. 21, 1955	Sold or gave away narcotics not in pursuance of proper order—26 U. S. C. 4705
5	Jan. 21, 1955	Distributed narcotics not in original stamped package—26 U. S. C. 4704
6	Jan. 21, 1955	Concealed and sold imported heroin—21 U. S. C. 174
7	Jan. 23, 1955	Sold or gave away narcotics not in pursuance of proper order—26 U. S. C. 4705
8	Jan. 23, 1955	Distributed narcotics not in original stamped package—26 U. S. C. 4704
9	Jan. 23, 1955	Concealed and sold imported heroin—21 U. S. C. 174
10	Jan. 29, 1955	Sold or gave away narcotics not in pursuance of proper order—26 U. S. C. 4705
11	Jan. 29, 1955	Distributed narcotics not in original stamped package—26 U. S. C. 4704
12	Jan. 29, 1955	Concealed and sold imported heroin—21 U. S. C. 174
13	Jan. 30, 1955	Sold or gave away narcotics not in pursuance of proper order—26 U. S. C. 4705
14	Jan. 30, 1955	Distributed narcotics not in original stamped package—26 U. S. C. 4704
15	Jan. 30, 1955	Concealed and sold imported heroin—21 U. S. C. 174

The evidence for the Government, in pertinent part, may be summarized as follows:

Federal agent Fialkewicz, under an assumed name, arranged with a Miss Barbara Floyd (also indicted) to purchase narcotics (R. 20–22, 65). The pattern followed in all of the sales was for Miss Floyd to meet Fialkewicz and other agents at a pre-arranged rendezvous for the purpose of selling them heroin. According to Miss Floyd, she obtained the heroin for all the sales from petitioner to whom she delivered the money given her by the agents (R. 40, 45). She testified that she had accompanied petitioner to New

York on two occasions when he purchased narcotics (R. 40, 51), and that she received no money from petitioner for delivering the heroin but did it because she thought the agent was addicted to narcotics and "felt sorry" for him (R. 44). She further stated that she had used heroin only once before she met petitioner; that although not an addict she used heroin during the time she delivered for petitioner; and used it three or four times after her arrest when she obtained it from petitioner (R. 34–36, 51–52).

On January 21, 1955, agent Fialkewicz met Miss Floyd, drove her to the vicinity of petitioner's home, and gave her $100 for heroin which she promised to deliver later (R. 24, 69). Later that evening, she was driven by petitioner to her meeting with the agents (R. 25–26, 70–73, 94–95). At this meeting, she turned over fewer capsules than had been ordered (Counts 4–6) and agreed to deliver the remainder later (R. 26–27, 71). There were no stamps on the package and the agents did not give Miss Floyd an order form (R. 94). While she was talking with the agents, petitioner passed by and later drove her home (R. 27, 94–95). On January 23, 1955, she delivered the remainder of the heroin to the agents, again without stamps and order form (R. 28, 75–76, 78) (Counts 7–9). Miss Floyd had given the money to petitioner (R. 24) and had obtained the heroin from him (R. 25, 28).

On January 29, Fialkewicz telephoned Miss Floyd at petitioner's home and arranged for another sale (R. 29–30, 78–80). Miss Floyd met the agents that evening, again accompanied by petitioner, received

$80, and delivered less than the agreed amount of heroin (R. 30–31, 80–81) (Counts 10–12). There were no stamps and no order form (R. 82). Later that evening, Fialkewicz called Miss Floyd at petitioner's home, and arranged for her to deliver the remainder of the heroin. She did so in the early morning of January 30, again being driven to the rendezvous in petitioner's car (R. 31–32, 83–84) (Counts 13–15). As in the earlier transaction, petitioner was the source of the narcotic and the recipient of the money (R. 30–32).

On February 2, 1955, agent Fialkewicz, seeking to arrange another purchase from Miss Floyd, spoke directly to petitioner on the telephone (R. 86–88). When Fialkewicz mentioned his dealings with Miss Floyd, petitioner said that "[s]he delivered for me" (R. 88). Fialkewicz then met petitioner personally, and arranged to purchase heroin directly from him (R. 88).[3] This sale fell through, however, because, although petitioner drove to the place appointed for the sale and stopped, he left without meeting the agent (R. 89).

In December 1954, prior to the dealings with Miss Floyd, agents Kelly and Jackson had met her with petitioner on occasions when they unsuccessfully sought to obtain heroin directly from him (R. 53–59, 63). At that time petitioner told Kelly that he would not directly deal in narcotics, but would deal through someone (R. 56).

[3] At the time of the delivery on January 29, Fialkewicz overheard Floyd angrily tell petitioner, "You are putting me out in front and I am doing your work for you" (R. 81).

In sentencing the defendant, the District Court imposed a term of twenty months to five years and a $500 fine on each count,[4] directing that on counts 2, 4, and 7 the sentences were to run consecutively, "the sentences on the other counts to run concurrently with the sentences on counts 2, 4, and 7." The court went on: "In other words, the aggregate sentence is not less than five years and not more than 15 years, and a $1,500 fine." (R. 125–126).

In the Court of Appeals, the petitioner asserted a number of errors but in particular attacked the multiplicity of counts, contending that in many instances he had been convicted twice for the same alleged offense. In affirming the judgment, the majority of the Court of Appeals stated (R. 131):

> The record supports at least 5 of the sentences that were to run "concurrently with" the 3 consecutive sentences. It therefore supports the aggregate sentence. We need not decide whether it supports the "consecutive" sentences themselves.

Judge Bazelon, dissenting, thought only the convictions on counts 4, 5, 6, 10, 11, and 12 were valid. He concluded that the "Kelly-Jackson testimony" was inadmissible and that its consideration might have influenced the jury verdict as to counts 1–3. Counts 7–9, and 13–15, he considered invalid on the theory that two different deliveries of separate quantities of narcotics on different days did not constitute two trans-

[4] Sentence was imposed under District of Columbia Code 24-203, which provides for indeterminate sentences. This local law is no longer applicable to narcotic offenders. 26 USC (Supp. V) 7237 (d).

actions if made pursuant to one initial bargain (R. 132–139).

SUMMARY OF ARGUMENT

The Court of Appeals affirmed the conviction with the statement that the "record supports at least 5 of the sentences that were to run 'concurrently with' the 3 consecutive sentences." We therefore assume, as does petitioner, that petitioner's conviction was upheld on the basis of the counts considered valid by the dissenting judge. These are counts 4 (one of the three consecutive-sentence counts), 5, and 6, relating to the 21st of January, and counts 10, 11, and 12, relating to January 29, 1955. On that assumption, petitioner's theory that the six counts really amount to only two offenses—supporting a sentence of ten, rather than fifteen, years—raises the question of the applicability of *Gore* v. *United States,* 357 U. S. 386. On the other hand, petitioner was convicted on fifteen counts, no one of which has been held invalid by the Court of Appeals. If petitioner is correct that these six counts support only two offenses, it would be necessary to consider the validity of the other counts to determine whether they support the additional sentence. This issue has not been passed upon by the Court of Appeals and should be remanded to that court if necessary. We confine our discussion to the issues raised by petitioner.

I

In *Gore* v. *United States,* 357 U. S. 386, this Court upheld three separate sentences for three offenses growing out of one act of sale. Those offenses—concealment of unlawfully imported drugs, sale not in

pursuance of a written order, and sale not in or from the original stamped package—are the same offenses involved here.

The *Gore* decision is bottomed on the assumption that the three offenses arose out of one act of sale. We thus do not believe there is any merit in petitioner's contention that here the same evidence was used to prove three offenses, as a basis for distinguishing *Gore* or for suggesting that *Gore* be reconsidered. Petitioner expressly states (Pet. Br. 34) that the test is not what evidence the statutes permit, but what they actually require for conviction. On that basis, 21 U. S. C. 174 *requires* proof of transportation, concealment, or sale, and illegal importation. 26 U. S. C. 4704 *requires* proof of purchase, sale, or distribution not in or from the original stamped package. The statutes *do not require* proof of possession. One of the ways by which the elements of the crimes may be proven is by an inference which the statutes provide shall be drawn from the unexplained possession of narcotics without stamps. As to 26 U. S. C. 4705, there is no statutory presumption from possession alone; the absence of a written order form and a sale or distribution must be shown by direct evidence. Thus each statute requires proof of an element not found in the others, even though all of the elements of three offenses may be present in one sale transaction. While we do not think it important, we note that violations of the separate requirements were explicitly shown in this case. As to each transaction, the agents testified that there was a sale and that there were no stamps and no order form was used. The separate elements dis-

tinguishing the three statutes were, except for importation, affirmatively proved.

The fact that petitioner acted through Miss Floyd, an accomplice, does not mean that he committed only one offense as to each sale. Petitioner aided and abetted Miss Floyd in the consummation of each sale, and when she committed three offenses in the course of each transaction so did he. As her aider and abetter, her acts were his.

II

In affirming the conviction and sentence, the Court of Appeals considered the five-to-fifteen year sentence imposed in this case as a general sentence on all the counts of which petitioner was convicted, and petitioner does not challenge the treatment of the sentence as a general one. Since the convictions on six counts arising out of two sales were found to be valid, and since those six counts would support a sentence of up to thirty years, the majority of the court below found it unnecessary to consider the validity of any of the other counts. Petitioner now urges this Court to overturn the rule that, in upholding a general sentence, a reviewing court need only find sufficient valid counts to support that sentence.

Ever since *Claassen* v. *United States*, 142 U. S. 140, 146–147, it has been a well-established and constantly reaffirmed rule that a general or concurrent sentence imposed on several counts should not be reversed for error in one or more counts if there are sufficient valid counts to support the sentence. As late as *Pinkerton* v. *United States*, 328 U. S. 640, 641–642, fn. 1, the

Claassen language was quoted with approval as setting forth settled law.

The doctrine to be found in *Claassen* is not just an historical accident. It rests on the premise that our courts do not render advisory opinions and do not render judgments which will not afford relief to a party. It recognizes that in imposing a sentence the district court considers not only the offense, but even more the offender. And so, whenever it is reasonably apparent that reversal of particular counts will not, in view of the remaining counts, have any tendency to affect a change of sentence, the *Claassen* rule permits an appellate court to decline to consider additional counts once it has found sufficient valid counts to support the sentence.

In a sense, the *Claassen* rule, which leads to affirmance here, is similar to the principle of mootness. A case may become moot for many reasons, but however the question may arise, when the court is presented with a judgment which no longer affects legal rights it declines to answer the questions presented by the record, not because error did not occur, but because there is no longer a controversy between the parties. A decision would be of no benefit to the petitioner even if he shows that the judgment was faulty in some way. So it is in a case like this, where there are sufficient proper findings of guilt to support the sentence. There is no occasion for further review if there is no probability that further consideration will affect the sentence.

The *Claassen* rule as applied by the Court gives needed flexibility to the law. It permits the appellate

court to terminate review and affirm when it finds sufficient valid counts to support the sentence and there is no probability that the other counts, even if defective, contributed to the sentence. On the other hand, whenever a court of appeals finds a substantial number of bad counts, or believes that the district judge may wish to reduce the sentence in the light of its views, it may so indicate. Whether the appellate tribunal does so or not, the district court may reduce the sentence, on its own volition or at defendant's request. There is thus no need for the rigid rule urged by petitioner.

In this case it is not likely that the sentence would have been less if the nine counts which we have not considered here had been ignored by the trial judge. Although the sentencing judge noted there were fifteen counts before him, he placed much more emphasis upon the large quantities of narcotics involved in the admittedly valid counts. The sentence actually imposed, five to fifteen years, was well within the maximum sentence of thirty years which might have been imposed for the six counts considered here, and itself suggests that the trial court would not have imposed a lesser term if only six counts had been before him.

ARGUMENT

Since the Court of Appeals affirmed the conviction with the statement that the "record supports at least 5 of the sentences that were to run 'concurrently with' the 3 consecutive sentences", we assume, as does petitioner, that petitioner's conviction was upheld on

the basis of the counts accepted as valid by the dissenting judge. These are counts 4 (one of the three consecutive-sentence counts), 5, and 6, relating to the 21st of January, and counts 10, 11, and 12, relating to January 29, 1955. On that assumption, this case raises the question of the applicability of *Gore* v. *United States*, 357 U. S. 386, since on petitioner's theory only ten years of the five-to-fifteen year sentence could be sustained by the six counts. On the other hand, petitioner was convicted on fifteen counts, no one of which has been held invalid by the Court of Appeals. If the six counts considered by the Court of Appeals should be held to cover only two offenses, it would be necessary to consider the validity of the conviction on the other counts to determine whether they support the additional sentence. However, since the issues raised by the challenge to these counts were not passed upon by the Court of Appeals, we think that, if necessary, those issues should properly be remanded to the court below for its consideration. We confine our discussion to the issues raised by petitioner.

I

EACH SALE BY PETITIONER THROUGH HIS INTERMEDIARY RESULTED IN THREE OFFENSES IN VIOLATION OF THREE DIFFERENT STATUTORY REQUIREMENTS

A. THE RULING IN *Gore* v. *United States*, 357 U. S. 386, APPLIES HERE

Gore v. *United States*, 357 U. S. 386, is squarely in point and dispositive. In *Gore*, the petitioner was convicted of six counts for narcotic offenses growing

out of two sale transactions. There, as here (so far as counts 4–6 and 10–12 are concerned) Gore was charged, as to each transaction, with concealment of unlawfully imported drugs, sale not in pursuance of a written order, and sale not in or from the original stamped package. Consecutive sentences were imposed as to the first three counts, and the legality of those sentences was the core of the controversy.

This Court reasoned that "[t]he fact that an offender violates by a single transaction several regulatory controls devised by Congress as means for dealing with a social evil as deleterious as it is difficult to combat does not make the several different regulatory controls single and identic" (357 U. S. at 389). To the contrary, "[t]he three penal laws for which petitioner was convicted have different origins both in time and design" (357 U. S. at 390), evidencing a Congressional intent that if a defendant violates all three statutes by one narcotics transaction he should not be treated as though he committed only one of these offenses (357 U. S. at 391). The Court ruled that it was not constitutionally beyond the power of Congress (as an encroachment upon the prohibition against double jeopardy) to impose separate punishment for the separable violations of separate requirements involved in the one act of sale.

Gore cannot be distinguished from the instant case on the ground that it arose on a motion to vacate sentence under 28 U. S. C. 2255, whereas this case comes to the Court on direct appeal after a conviction. In *Blockburger* v. *United States*, 284 U. S. 299,

the offender was charged, convicted, and cumulatively sentenced for selling narcotics not in the original stamped package and not in pursuance of a written order. Both offenses arose out of one sale. That case came to this Court, as does this case, on direct appeal and it was held that the offenses were separate, and severally punishable. The decision in *Gore* expressly rested, in part, upon the authority of the earlier case—this Court saying (357 U. S. at 388), "We adhere to the decision in *Blockburger* v. *United States, supra.*" The *Gore* decision was based on the expressed intent of Congress in enacting the three statutes in question, not upon any difference arising from the narrower scope of review on collateral attack as distinguished from direct review.

Also, as is pointed out more fully in the government's brief in the *Harris* case, No. 11, this Term, *Gore* is indisputably bottomed on the assumption that the three offenses arose out of one act of sale. In discussing the constitutionality of providing separate punishment for the various violations of different statutes in the one act of sale, the majority opinion noted, 357 U. S. at 392:

> Suppose Congress, instead of enacting the three provisions before us, had passed an enactment substantially in this form: "Anyone who sells drugs except from the original stamped package and who sells such drugs not in pursuance of a written order of the person to whom the drug is sold, and who does so by way of facilitating the concealment and sale of drugs knowing the same to have been unlaw-

> fully imported, shall be sentenced to not less than fifteen years' imprisonment: *Provided, however,* That if he makes such sale in pursuance of a written order of the person to whom the drug is sold he shall be sentenced to only ten years' imprisonment: *Provided further,* That if he sells such drugs in the original stamped package he shall also be sentenced to only ten years' imprisonment: *And provided further,* That if he sells such drugs in pursuance of a written order and from a stamped package, he shall be sentenced to only five years' imprisonment." Is it conceivable that such a statute would not be within the power of Congress? * * *

We thus do not believe there is any merit at all in petitioner's argument that here the same evidence was used to prove three separate offenses, as a basis either for distinguishing *Gore* or for suggesting that this Court reconsider that decision. As petitioner himself states (Pet. Br. 34), the test "is not what evidence the statutes permit, but what they actually *require* for conviction." None of the statutes *requires* proof of possession. 21 U. S. C. 174 *requires* proof of transportation, concealment, or sale, and proof of illegal importation. This may be proven by direct evidence. Another means by which the elements of the crime may be proven is by an inference derived from the unexplained possession of narcotics. 26 U. S. C. 4704 *requires* proof of purchase, sale, or distribution not in or from the original stamped package. Again, this proof may be supplied by direct

evidence. Alternatively, or to buttress the direct evidence, resort may be had to an inference which the statute provides shall be drawn from the unexplained possession of narcotics without stamps. And, as petitioner acknowledges (Br. 19), as to 26 U. S. C. 4705, there is no statutory presumption from possession alone; the absence of a written order form and a sale or distribution must be shown by direct evidence.[5] Thus each statute does, as this Court held in *Blockburger* v. *United States,* 284 U. S. 299, require proof of an element not found in the other. It can happen that proof of one sale without a written order, from an unstamped package, would show a violation of all three statutes; it is still true that violations of three different statutes, having three different requirements, are shown by that proof.

Indeed, in this case, violations of the separate requirements were explicitly shown. As to each transaction, the agents testified to the sale, leaving only the necessity of presuming that the sellers knew that the narcotics were illegally imported. And as to each transaction, the agents testified specifically that there were no stamps and no order form was used. Thus, while we do not think it important, the fact is that the separate elements that distinguished the three statutes

[5] The judge did not charge as to any presumption of possession on the counts under 26 U. S. C. 4705 (R. 116). Manifestly, therefore, the conviction on the counts under that statute (counts 1 [conspiracy to violate §§ 4704 (a) and 4705], 4, 7, 10, and 13) cannot be attributed to the proof of possession. Rather, they rest on proof that petitioner aided Miss Floyd to make the sale without an order form.

were, except for importation, affirmatively proved in this case.[8]

B. THE FACT THAT PETITIONER ACTED THROUGH AN ACCOMPLICE DOES NOT MEAN THAT HE IS CHARGEABLE WITH ONLY ONE OFFENSE AS TO EACH SALE

Petitioner argues that, even if the three separate violations by Miss Floyd were shown, the proof as to him becomes single because the jury was allowed to convict him as an aider and abettor. The government did proceed on the theory that petitioner was the source of the narcotics sold by Miss Floyd to the federal agents, that he was the recipient of the money, and was Miss Floyd's aider and abettor in the consummation of the sales. The trial judge gave full instructions on this theory (R. 119–120)—instructions which are not questioned on the grounds of accuracy or completeness here. Petitioner's use of an intermediary in effecting the sales of narcotics does not transform three offenses into one.

18 U. S. C. 2, *supra*, p. 2, provides that anyone who "aids, abets, counsels, commands, induces or procures" the commission of an offense, or "willfully causes an act to be done which if directly performed by him or another would be an offense," is punishable as a principal. In this case it was necessary that petitioner " 'in some sort associate himself with the

[8] As to the two offenses which make possession (21 U. S. C. 174) and absence of stamps in the hands of the possessor (26 U. S. C. 4704) presumptive evidence of the respective violations, the judge did, as the statutes require, permit the jury to find guilt from the finding of possession of unstamped narcotics.

venture, that he participates in it as in something that he wishes to bring about, that he seek by his action to make it succeed'." *Nye & Nissen* v. *United States*, 336 U. S. 613, 619, quoting from *United States* v. *Peoni*, 100 F. 2d 401, 402 (C. A. 2).

The venture in which petitioner associated himself was to sell illegally imported narcotics without an order form and without stamps. The jury certainly had the right to infer that petitioner, when he supplied Miss Floyd with narcotics, knew that the narcotics did not come from a stamped package and knew that she was selling without an order form. Petitioner, as an aider and abettor, stands in Miss Floyd's shoes. When she sold illegally imported drugs, that act was petitioner's. When she sold heroin which was not in the original stamped package, then petitioner so sold. And when she sold narcotic drugs other than pursuant to a written order form, petitioner was chargeable with her offense. If, in the course of two sales, Miss Floyd committed six offenses, then petitioner was equally guilty. One who enlists the services of an agent, so that he can conceal his identity or increase the scope of his illegal activities, does not thereby consolidate his liability into a single offense when that agent, at his direction, commits several offenses.

II

A COURT OF APPEALS, UPON FINDING VALID SUFFICIENT COUNTS TO SUPPORT THE SENTENCE IMPOSED, MAY AFFIRM THE CONVICTION WITHOUT PASSING ON ALL COUNTS.

In affirming the conviction and sentence, the Court of Appeals considered the fifteen-year sentence im-

posed in this case as a general sentence on all the counts of which petitioner was convicted.[7] Since the convictions on six counts arising out of two sales were found to be valid, and since those six counts would support a sentence up to thirty years, the majority of the court below found it unnecessary to consider the validity of any of the other counts.

Petitioner agrees that the sentence imposed was a general one and the record supports this construction of the sentence.[8] Both orally from the bench and in the formal order, the district judge indicated that he was imposing consecutive sentences on counts 2, 4, and 7, and that the sentences on the other counts were to

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[7] Ever since *In re De Bara*, 179 U. S. 316, 322, and *In re Henry*, 123 U. S. 372, it has been established that the trial court has the power to give a single sentence for several offenses in excess of that which is lawful for one offense, so long as the cumulative maximum punishment is not exceeded. *Phillips* v. *United States*, 212 F. 2d 327, 335 (C. A. 8); *Barnes* v. *United States*, 197 F. 2d 271, 273 (C. A. 8); *Levine* v. *Hudspeth*, 127 F. 2d 982, 984 (C. A. 10), certiorari denied, 317 U. S. 628; *McKee* v. *Johnston*, 109 F. 2d 273, 275 (C. A. 9), certiorari denied, 309 U. S. 664; *Jackson* v. *Hudspeth*, 111 F. 2d 128, 129 (C. A. 10); *Ross* v. *Hudspeth*, 108 F. 2d 628, 629 (C. A. 10); *Hawkins* v. *United States*, 14 F. 2d 596, 597–598 (C. A. 7); *Klein* v. *United States*, 14 F. 2d 35, 37 (C. A. 1); *Neely*, et al. v. *United States*, 2 F. 2d 849, 852 (C. A. 4); *Feigin* v. *United States*, 3 F. 2d 866 (C. A. 9).

[8] If the sentence could not be considered as a gross sentence, at least as to the 12 counts which were to be concurrent with 2, 4, and 7, we believe that the case would have to be remanded to the Court of Appeals to pass on the validity of counts 2, 4, and 7. If it found any one of them invalid, that court would then have to remand to the District Court for resentencing, since, assuming that the other counts cannot be considered in gross, it is not clear which of them, taken individually, were to be concurrent with 2, which with 4, and which with 7.

run concurrently with the sentences on those counts (R. 124–126). The district judge did not indicate which of the twelve remaining counts were to run concurrently with particular "consecutive" counts. On the contrary, his language indicates that as a group the twelve counts were to be concurrent with "2, 4 and 7." The language of the formal order ("said sentences by the Counts to run concurrently and to run concurrently with the sentences imposed on Counts Two, Four and Seven") also indicates a collective lumping of the twelve remaining counts in support of the aggregate sentence imposed on the three counts.

That the construction of the sentence as a general one is correct also seems clear from the district judge's final statement from the bench (R. 126):

> In other words, the aggregate sentence is not less than five years and not more than 15 years, and a $1,500.00 fine.

The majority of the court below quoted this language and noted that the judge had imposed an "aggregate sentence" (R. 131). The dissenting judge agreed that there had been an aggregate sentence, but stated that he did "not assume that the District Court would have imposed the same aggregate sentence for a conviction of six counts as for a conviction of 15 counts" (R. 139). In the light of the view of the Court of Appeals, interpreting a sentence imposed under local procedures, we think the status of the sentence as a general one is settled.

Although agreeing that the sentence here was a general one, petitioner urges this Court to reconsider

the rule, which he admits is well-established, that in upholding such a sentence a reviewing court need find only sufficient valid counts to support that sentence. He argues that a district court would usually consider the number of crimes of which a defendant was convicted and, unless the convictions on all the crimes are reviewed, there is no certainty that this premise on the part of the trial judge is a correct one.

The principle which petitioner is here attacking was first stated by this Court more than sixty-five years ago, in *Claassen* v. *United States,* 142 U. S. 140, 146–147, where it was said:

> And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only.

The rule has been constantly reaffirmed. *Emspak* v. *United States,* 349 U. S. 190, 195, fn. 9; *Pinkerton* v. *United States,* 328 U. S. 640, 641–642, fn. 1; *Whitfield* v. *Ohio,* 297 U. S. 431, 438; *Sinclair* v. *United States,* 279 U. S. 263, 299; *Abrams* v. *United States,* 250 U. S. 616, 619; *Evans* v. *United States,* 153 U. S. 584, 595. In 1946, the Court quoted the *Claassen* language with approval and said that "It is settled law". *Pinkerton* v. *United States, supra,* 328 U. S. at 642, fn. 1.

The same rule is applied where there are concurrent sentences adjudged on separate counts, at least one of which is good. *Lawn* v. *United States*, 355 U. S. 339, 359; *Roviaro* v. *United States*, 353 U. S. 53, 59, fn. 6; *United States* v. *Sheridan*, 329 U. S. 379, 381; *Hirabayashi* v. *United States*, 320 U. S. 81, 85; *United States* v. *Johnson*, 319 U. S. 503, 518; *Gorin* v. *United States*, 312 U. S. 19, 33; *United States* v. *Trenton Potteries*, 273 U. S. 392, 402; *Brooks* v. *United States*, 267 U. S. 432, 441; *Pierce* v. *United States*, 252 U. S. 239, 252–253; *Debs* v. *United States*, 249 U. S. 211, 216.

The continuing validity of this doctrine over so long a period of years must be attributed to something more than an historical accident. See *Hawkins* v. *United States*, No. 20, this term, decided November 24, 1958; *Weiler* v. *United States*, 323 U. S. 606, 609–610. And the fact is that the rule which petitioner asks this Court to overturn is supported by valid considerations other than simple precedent or the presumption expressed in *Claassen*.[9] The rule rests on the sound

[9] Petitioner suggests that the Court in the *Claassen* case was led into error by reliance upon the English cases of *Peake* v. *Oldham*, Cowp. 275, 276, 98 Eng. Rep. 1083, 1084; *Rex* v. *Benfield*, 2 Burr. 980, 985, 97 Eng. Rep. 664, 667; and *Grant* v. *Astle*, 2 Doug. 722, 730, 99 Eng. Rep. 459, 466. He contends that the English rule is that one good count is not enough to sustain the verdict and sentence if other counts are bad, and cites *O'Connell* v. *Regina*, 11 Clark & Fin. 155, 366–373, 8 Eng. Rep. 1061, 1141–1143. The short answer is that the Court in *Claassen* expressly considered, and rejected, the *O'Connell* case. *O'Connell* was decided in the House of Lords by the votes of Lord Denman, Lord Cottenham and Lord Campbell against the votes of the Lord Chancellor and Lord Brougham. 8 Eng. Rep. at 1119, 1161. The opinion of the majority was contrary

premise that our courts do not render advisory opinions and do not render judgments which will not afford relief to a party. It recognizes that district judges in imposing sentence consider not only the offense, but even more the offender. And so, whenever it is reasonably apparent that reversal of particular counts will not, in view of the remaining

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to the opinion of the majority of the judges who were asked to give their advice. Judges Tindal (8 Eng. Rep. at 1091, 1093), Patteson (8 Eng. Rep. at 1100–1103), Maule (8 Eng. Rep. 1104), Williams (8 Eng. Rep. at 1107–1109), Gurney (8 Eng. Rep. at 1110), Alderson (8 Eng. Rep. at 1111–1113), and Coleridge (8 Eng. Rep. at 1119) would have affirmed the verdict and judgment below. Coltman (8 Eng. Rep. at 1105–1106) and Parke (8 Eng. Rep. at 1114–1116) would have reversed. As to the majority in the House of Lords who voted to reverse, only Denman (8 Eng. Rep. at 1141) and Campbell (8 Eng. Rep. at 1158–1159) did not accept the proposition that judgment and sentence is presumed to be entered on the good counts and not the bad when nothing else appears. Lord Cottenham expressly put his decision on the ground that the facts of the *O'Connell* case showed that judgment and sentence were given on the bad as well as the good counts (8 Eng. Rep. at 1151). This, of course, is the ground expressly saved in *Claassen*, 142 U. S. at 146–147.

Moreover, Great Britain changed the rule of the *O'Connell* case by statute. See Stat. 11 & 12 Vict. c. 78, s. 5, and *Holloway* v. *The Queen*, 17 QB 317, 322; 117 Eng. Rep. 1300, 1303, fn. (a)1. At the present time, the applicable law in Great Britain is 7 Edw. VII c. 23, s. 5 (1), 14 The Statutes Revised (3d ed.) p. 185, which provides:

"If it appears to the Court of Criminal Appeal that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the court may either affirm the sentence passed on the appellant at the trial, or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the verdict on the count or part of the indictment on which the court consider that the appellant has been properly convicted."

counts, have any tendency to affect a change of sentence, it would violate the rule of judicial parsimony to require an appellate court to consider additional counts once it has found sufficient valid counts to support the sentence. The courts should not be required to resolve issues which would not result in relief to the complaining party. Clearly if, after conviction for a number of counts, the judge has imposed a sentence of the minimum for only one count, there would be no purpose in reviewing more than one count. Similarly, even where the general sentence is beyond that permissible on more than one count, there is usually no purpose to be gained, no available relief to the defendant, in reviewing more counts than are necessary to support the sentence.

An analogy can be drawn between the rule leading to affirmance here and cases involving mootness. Cases may become moot for many reasons. Petitioner may have served his sentence before certiorari was granted, and the conviction may have no other future consequences. *St. Pierre* v. *United States*, 319 U. S. 41; cf. *Fiswick* v. *United States*, 329 U. S. 211, 220–223). The law may have been changed pending the appeal. *United States* v. *Alaska Steamship Company*, 253 U. S. 113, 115–116. The declaration of war may have compelled the termination or suspension of illegal activities. *United States* v. *Hamburg-American Company*, 239 U. S. 466, 475–476. In a habeas corpus case, the custody or restraint may have been terminated without use of the writ. *Eagles* v. *Samuels*, 329 U. S. 304, 307. However the question may arise, when the Court is presented with a judg-

ment which no longer affects legal rights, it declines to answer the questions which the record may present, not because error did not occur, but because there is no longer a controversy between the parties. A decision may not result in any benefit to the petitioner even if he shows that the judgment was faulty in some way. So it is in a case like this, where there are sufficient proper findings of guilt to support the sentence. There is no occasion for further review if there is no probability that further consideration will affect the sentence.

Indeed, the rule often results in benefit to a defendant. If a court, after finding enough good counts to support a verdict, would go on and review other counts and then reverse, a defendant might be subject to retrial on those additional counts, even if the sentencing judge reaffirmed the sentence on the counts which were sustained. This probably would not often occur, but it would be possible. See *Putnam* v. *United States*, 162 U. S. 687, where petitioner was convicted on two counts and received concurrent sentences of equal length on each count (162 U. S. at 688, 689). On appeal, cause for reversal was found as to one count. This Court noted (162 U. S. 714):

> * * * it is doubtful whether the error committed, as to the second counts, should be treated as prejudicial, since the only effect of reversing and ordering a new trial, as to this count, will be to leave the full term of the existing sentence in force and to submit the accused to another trial on the second count, *from which, if convicted, an additional sentence may result.* [Emphasis added.]

Because the rule is essentially based on the realistic consideration of whether further review will accomplish any result, the exceptions to which petitioner points merely reinforce the rule. Where it does seem likely that review of all aspects of the case is necessary to support a sentence, the appellate courts have reviewed the whole case, even where one phase would support a general sentence. In *Yates* v. *United States,* 355 U. S. 66, for example, petitioner had been convicted of eleven criminal contempts and only one was sustained. Moreover, the case was one of contempt, where traditionally the appellate courts have had more power over the penalty. The same reasoning applies to *Nilva* v. *United States,* 352 U. S. 385, where only one of three counts for criminal contempt was sustained. And see *United States* v. *Hines,* 256 F. 2d 561, 563 (C. A. 2).[10]

In other words, whenever a court of appeals finds a substantial number of bad counts, or believes that

[10] The other decisions of this Court referred to in *Hines* involved different considerations. In *Yasui* v. *United States,* 320 U. S. 115, 117, the district court, which imposed the maximum penalty, had held that petitioner, a Japanese-American, had renounced his American citizenship and therefore was subject to World War II curfew regulations as an alien. On appeal, it was held that, although curfew regulations were applicable to American citizens of Japanese descent, petitioner had not renounced his American citizenship. The case was remanded for resentencing in the light of that fact. In *Husty* v. *United States,* 282 U. S. 694, 703, the Court of Appeals had sustained general sentences on the theory that they were supported by the second of two counts alone. This Court did not question the general principle in *Claassen,* but remanded for resentencing because the second count would not support the sentences imposed and because of confusion in the court below as to the permissible maximum sentence.

the district judge might wish to reduce the sentence in the light of its views, it may so indicate; or the appellate court may, if it wishes, consider and pass upon all the counts. The matter is within the sound discretion of the Court of Appeals. And whatever the appellate court does, the district court may always reduce the sentence in the light of the Court of Appeal's action. In every case, a defendant may request the district court to reduce his sentence after appellate review is completed. Rule 35 of the Federal Rules of Criminal Procedure provides:

> The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

There is thus no need for the rigid rule suggested by petitioner that the Court of Appeals *must* consider each count.

In this case involving a large number of counts, it is unrealistic to assume that the sentence would have been less if the nine counts which we have placed to one side had been ignored by the trial judge. It is true, as mentioned by the dissent below (R. 139), that the sentencing judge noted that there were fifteen counts before him. But the trial judge placed much more emphasis upon the quantities of narcotics involved in the admittedly valid counts, for at the time of sentencing he said (R. 125):

> This is a narcotic offense of an exceedingly aggravated character, because apparently this defendant has been dealing in narcotics, in large quantities for a considerable period of time. Some of the counts involve quantities as large as 40 capsules. * * *

These remarks could relate only to the transactions occurring on January 21 and 29, 1955, counts 4–6 and 10–12; these offenses must have been foremost in the judge's mind. Then, too, the sentence itself suggests that the trial judge would not have selected a lesser term if faced with six instead of fifteen counts. A maximum sentence of thirty years could have been assessed on the six counts considered here, *Gore* v. *United States, supra,* and the adjudged term of five-to-fifteen years was well within permissible limits. Under these circumstances, review of the additional counts would appear to have been an academic discussion of no real benefit to petitioner.[11]

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[11] Petitioner urges (Pet. Br. 43) that all counts should be reviewed because exposure of errors in counts not directly affecting the length of sentence "might materially affect a defendant's parole chances, his standing in society, and even his punishment in the event he is subsequently convicted again and sentenced as a repeating offender." Petitioner is mistaken.

As to parole, eligibility depends upon service of "one-third of the total of the term or terms for which he [the defendant] was sentenced * * *." 28 C. F. R. 2.1. The number of counts upon which concurrent sentences were imposed is therefore immaterial. See 18 U. S. C. 4202; *United States* v. *Howell*, 103 F. Supp. 714, 717 (S. D. W. Va.), affirmed, *Howell* v. *United States*, 199 F. 2d 366 (C. A. 4); *Williamson* v. *Hardwick*, 135 F. Supp. 463, 464 (N. D. Ga.). Nor is the decision of the Board of Parole as to whether an eligible prisoner should be released on parole dependent upon the number of counts. The test is whether "there is a reasonable probability that such prisoner will

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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DECEMBER 1958.

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live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society * * *." 18 U. S. C. 4203.

Finally, sentencing as a second offender would be affected only if a defendant were convicted of narcotics violations and other crimes included in the same indictment (but cf. Rule 8, F. R. Crim. P., dealing with joinder of offenses) and the court refused to review the narcotics counts because the other counts were valid. See 26 U. S. C. (Supp. V) 7237 (c), regarding penalties for subsequent violations of the narcotics statutes. Such is not this case.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 134

WILLIAM C. GREENE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 134

WILLIAM C. GREENE,

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v.

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Respondent.

BRIEF FOR PETITIONER

Opinions Below

The opinions of the United States Court of Appeals for the District of Columbia Circuit are reported at 246 F.2d 677, 100 U.S. App. D.C. 396, and are printed at R. 131-139. There was no opinion by the United States District Court for the District of Columbia.

Jurisdiction

The judgment of the Court of Appeals was entered May 16, 1957. On June 10, 1957, by order of the Chief Justice, petitioner's time for filing his petition for writ of certiorari was extended to and including July 5, 1957. That petition, together with a petition for leave to proceed *in forma*

pauperis, was filed on July 5, 1957, and both petitions were granted June 30, 1958, 357 U.S. 934. The jurisdiction of this Court is based on 28 U.S. 1254(1).

Constitutional Provision, Statutes and Rule Involved[1]

The Fifth Amendment to the United States Constitution, states, in part, that "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law . . ."

The Narcotic Drugs Import and Export Act, section 2(c), 65 Stat. 767, 21 U.S.C. 174:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence

[1] The texts of the statutes quoted are as of February 10, 1956, the date of the trial court's judgment and commitment (R. 124-125). The citations are to the current U. S. Code.

shall not be suspended and probation shall not be granted. For the purpose of this subdivision, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 7237(a) of the Internal Revenue Code, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; section 1, chapter 202 of the Act of May 26, 1922 (42 Stat. 596), as amended; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557 (b)(1) or 2596 of the Internal Revenue Code enacted February 10, 1939 (ch. 2, 53 Stat. 274, 282), as amended. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subdivision.

"Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The Harrison Anti-Narcotic Act, sections 1, 2 and 9, in part, 68A Stat. 550-551, 860, as amended, 69 Stat. 3, 26 U.S.C. (1954 I.R.C.) 4704(a), 4705(a), and 7237(a):

Sec. 4704(a):

"It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

Sec. 4705(a):

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

Sec. 7237(a):

"Whoever commits an offense or conspires to commit an offense described in subpart C of part I, or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than 5 or more than 10 years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than 10 or more than 20 years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subsection, an offender shall

be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subsection or in section 2 (c) of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C. 174), or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the act of December 17, 1914 (38 Stat. 789), as amended; section 1, chapter 202, of the act of May 26, 1922 (42 Stat. 596), as amended; section 12, chapter 553, of the act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557 (a) (1) or 2596 of the Internal Revenue Code enacted February 10, 1939 (ch. 2, 53 Stat. 274, 282), as amended. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subsection."

18 U.S.C. 2, 65 Stat. 717:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an

offense against the United States, is punishable as a principal."

Federal Rule of Criminal Procedure No. 35:

"The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari."

Questions Presented

1. Can a defendant properly be convicted and sentenced, on the basis of exactly the same evidence, under three different provisions of the Federal Narcotics laws, for his part in assisting a single narcotics sale, simply because all three provisions coincidently denounce the sale itself, although they were actually intended to be complementary parts of a Congressional scheme to insure the detection and successful prosecution of all forms of narcotics trafficking and there is substantial evidence that Congress did not intend their cumulative application to a single transaction?

2. Assuming the invalidity of 10 counts, including all 3 consecutive-sentence counts, in the District Court's 15-count judgment, may a federal appellate court properly affirm without opinion the entire judgment and sentence on the theory that the remaining 5 unidentified counts which the appellate court deems valid would support the aggregate sentence already imposed and the trial court would not reduce that sentence even if the 10 invalid counts were actually reversed and the case were remanded for resentencing?

Statement

This case arises from an indictment in 15 counts charging offenses against the federal narcotics laws. Judgment and sentence on all 15 counts was imposed upon petitioner by the United States District Court for the District of Columbia (R. 124-5). On direct appeal the United States Court of Appeals for the District of Columbia Circuit affirmed *per curiam* (R. 131-2), Circuit Judge Bazelon dissenting (R. 132-139). In this Court petitioner attacks the judgment and sentence of the District Court as excessive in law, and he also attacks the action of the Court of Appeals as denying him a full, fair and effective review of the trial court's judgment and sentence.

The Indictment

The indictment (R. 1-9) is at the heart of this case. It is a complex document because of the number and interrelationship of the counts. It charged petitioner and another person named Barbara Floyd with conspiracy (Count 1, R. 1-5) to violate three different federal anti-narcotics statutes—21 U.S.C. 174, 26 U.S.C. 4704(a), and 26 U.S.C. 4705(a)—and with 14 separate substantive violations of the same statutes, as follows (R. 5-9):

21 U.S.C. 174—Counts 2, 3, 6, 9, 12, and 15;

26 U.S.C. 4704(a)—Counts 5, 8, 11, and 14;

26 U.S.C. 4705(a)—Counts 4, 7, 10, and 13.

These 14 counts in turn were based on four separate purchases of heroin capsules from Floyd by Federal Narcotics Bureau Agent Fialkewicz, posing as an addict. All occurred during January, 1955. Count 1 charged conspiracy based on these transactions, and counts 2 and 3 charged a single violation of 21 U.S.C. 174 in each of the first two sales, on January 14 and 18, respectively.

The treatment of the other sales, January 21 and 29, was different, however. In each case Floyd, because of her initial inability to secure all the heroin desired by Fialkewicz, arranged a second meeting at which she delivered the rest of his purchase. The indictment charged three separate crimes (one apiece under the above statutes) *for each delivery*—that is six counts based on each sale, and 12 counts in all.[2]

Purchase of 67 heroin capsules for $100 on Jan. 21, 1955 → Delivery of 30 capsules, Jan. 21, 1955 (R. 5, 6) (Count 4) (26 U.S.C. 4705(a)) (Count 5) (26 U.S.C. 4704(a)) (Count 6) (21 U.S.C. 174)

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Delivery of remaining 37 capsules, Jan. 25, 1955 (R. 6, 7) (Count 7) (26 U.S.C. 4705(a)) (Count 8) (26 U.S.C. 4704(a)) (Count 9) (21 U.S.C. 174)

Purchase of 53 heroin capsules for $80 on Jan. 29, 1955 → Delivery of 20 capsules, Jan. 29, 1955 (R. 7, 8) (Count 10) (26 U.S.C. 4705(a)) (Count 11) (26 U.S.C. 4704(a)) (Count 12) (21 U.S.C. 174)

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Delivery of remaining 33 capsules, Jan. 30, 1955 (R. 8, 9) (Count 13) (26 U.S.C. 4705(a)) (Count 14) (26 U.S.C. 4704(a)) (Count 15) (21 U.S.C. 174)

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[2] The overt acts in the conspiracy charge (Count 1) reflect the treatment shown in the table. See overt acts 8 to 15 (R. 2-4) and 16 to 21 (R. 4-5).

The Government's Evidence of the Sales

The government's evidence principally consisted of the testimony of Fialkewicz and of Barbara Floyd herself. Prior to petitioner's trial Barbara Floyd had pleaded guilty to the conspiracy charge, count 1 (R. 46, 47), and after trial the remaining 14 counts in her case were dismissed on the motion of the prosecutor (R. 128-130). She testified that she was a narcotic user herself (R. 34), and that when Fialkewicz first approached her posing as an addict she "felt sorry" (R. 45) for him. She said she had turned to petitioner for help in securing the heroin needed by Fialkewicz: "I knew no one that I could purchase it from, that I would go to and purchase it from" (R. 40; see also R. 47). She said petitioner secured the narcotics for her to give to Fialkewicz, and the evidence showed that he drove her to the meetings with Fialkewicz on January 21, 22, 29 and 30 involving the last two sales.

The earlier two sales did not directly implicate petitioner. Floyd first met Fialkewicz in the early evening January 14 when the first transaction occurred. She had dinner with him and another agent, accepted $30 from Fialkewicz, and then left him. Later in the evening she rejoined him and gave him 17 heroin capsules (R. 22-23, 65-66). This is the basis of *count 2*. Again on January 18, Floyd was alone when she met Fialkewicz for a second time. This time they drove together to her house where she accepted $8 from Fialkewicz and went inside. She returned with 4 heroin capsules (R. 23-24, 68). *Count 3* is based on this evidence. Only Floyd's testimony links petitioner, even indirectly, with these two sales. On the first occasion she said she left the agents and went to petitioner's house where she exchanged the money for capsules (R. 22). There is no evidence that petitioner then knew of her purpose, merely Floyd's statements that he had been a friend of hers for

some time and that she knew she could secure narcotics through him (R. 33-34, 40). On January 18 she did not even go to petitioner, but rather to her own home where she got four capsules "that I had had" from petitioner (R. 24).

The pattern of the last two sales was different, however. On January 21 Fialkewicz again sought out Floyd to secure more heroin capsules. He drove her to petitioner's house and gave her $100 for the purchase. She testified that she contacted petitioner and during the day a meeting was arranged with Fialkewicz for that evening. Petitioner drove Floyd to that meeting, as he did to subsequent January meetings with the agent, and she gave the latter 30 capsules, simultaneously arranging a second meeting that night to deliver the rest (R. 24-26, 71). The second meeting was abortive; Floyd testified that petitioner was unable to secure more capsules until the next day (R. 26-28). On the 23rd Fialkewicz came to Floyd's house and picked up from her 37 more capsules to complete the sale. Petitioner evidently was not present at that time (R. 28, 75). On the basis of this transaction, petitioner was convicted of the offenses charged in *counts 4 to 9*.

The last sale, on January 29-30 was similar but compressed in time. On the 29th Fialkewicz called Floyd and set up a meeting with her for that evening to buy more capsules. When they met he gave her $80 and she gave him 20 heroin capsules—all she had with her then—saying that she would deliver more capsules later that night (R. 29-31, 81). The second meeting, at which she gave Fialkewicz 33 capsules, occurred shortly after midnight. Petitioner drove Floyd to both rendezvous (R. 32, 84). He also got the capsules for her. The events of this night formed the basis of *counts 10 to 15*.

Three days later Fialkewicz called petitioner's house to arrange a new purchase with Floyd, but petitioner talked to him and a bit later met him by arrangement at a restaurant. During their conversation, Fialkewicz testified, petitioner referred to Floyd as a woman who "delivered for me" (R. 88) and agreed to secure some heroin for the disguised agent. However, at the appointed time petitioner and another man merely drove by the agreed place and went on (R. 89).

This was the last event, and the only conversation or direct meeting between Fialkewicz and petitioner, before the latter's arrest seven days later on February 9, 1955. At that time petitioner and his house were searched, but neither narcotics nor any of the $218 of marked money which Fialkewicz had used for his purchases was found. In fact, some five government agents, including Fialkewicz, testified about various aspects of the four sales, but none of them ever had any direct dealings with petitioner, except as just indicated, and none of them had observed either narcotics or the marked purchase money in his possession (R. 90-91, 96, 101, 103, 106). Floyd was the sole witness in that respect.

Other Evidence

There was also evidence, admitted over repeated objections by petitioner's counsel (R. 56, 60-61, 107, 122), of an unsuccessful attempt by two other incognito narcotics agents, Kelly and Jackson, in December 1954 to purchase heroin from petitioner for resale, on the pretext of raising bail money for a "mutual" friend who was then in jail (R. 52-64). Floyd was present at two meetings during this time but took no part in the discussions, so far as the evidence showed. Kelly and Jackson testified that the proposed purchase had been agreed to but then fell through because

of petitioner's insistence on payment in advance. The government claimed the relevance of this evidence to the conspiracy charge (count 1), although the 22 "overt acts" were based entirely on the events described above (R. 1-5). The trial judge charged the jury that the Keily-Jackson testimony was introduced "in order to show defendant Greene's knowledge of what was going on" at the time of the January 1955 sales (R. 119).

At the close of evidence petitioner moved for a judgment of acquittal, particularly arguing that there was no evidence of possession to support "several counts" based on 21 U.S.C. 174; but Judge Holtzoff denied the motion, noting that Floyd had testified to the fact of petitioner's possession: "Don't overlook that the witness Floyd was the complete witness here" (R. 107). The charge to the jury followed.

The Charge to the Jury

Certain portions of Judge Holtzoff's charge to the jury are particularly relevant. Before discussing the various counts and statutes involved he stated (R. 114):

> "Narcotics have a recognized, legitimate use in medicine, and of course that use must not be interfered with. On the other hand, the use of narcotics when not under the legitimate supervision of a physician is regarded as dangerous and susceptible of an evil and insidious influence. For this reason traffic in narcotics is regulated by law, in order that narcotics may be obtainable for medicinal purposes under the supervision of a physician, but at the same time in order that they may not be obtainable for illicit and illegitimate uses. Accordingly, sale and purchase of narcotic drugs are permitted only through certain legitimate, recognized channels and only in certain legitimate

ways, under proper governmental supervision. All traffic in narcotics outside of the channels prescribed by law, as I have just indicated, is illicit and is criminal, because of its detrimental effect on the community."

Then he turned to the substantive counts and in summarizing them he read and then briefly discussed each of the three narcotics laws involved. Regarding 21 U.S.C. 174 he said (R. 115):

"In other words, the violation consists in facilitating the concealment and sale of narcotic drug which had been imported into the United States contrary to law, the defendant knowing that it has been so imported.

"The basis of this statute, ladies and gentlemen, is that it is a matter of common knowledge that narcotic drugs are not grown in the United States. The narcotic drugs that are available here are imported from certain foreign countries, and this statute punishes anyone who facilitates the transportation and concealment or sale of any imported narcotic drug, knowing it to be imported contrary to law. And the law proceeds further and provides that the Government does not have to prove every element of the offense enumerated in the statute, but all that the Government has to show is that the defendant had possession of the narcotic drug. The law further provides that such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains his possession of the drug to the satisfaction of the jury.

"In other words, if you find that the defendant had possession of this narcotic drug, in the District of Columbia, then from that fact alone you are at liberty to find the defendant guilty of a violation of the statute, without anything more, unless the defendant either by

himself or by some other witnesses explains the possession of the drug to your satisfaction."

In similar fashion he read, and then explained 26 U.S.C. 4704(a), as follows (R. 117).

"In other words, the violation of the law consists in purchasing or in selling or in distributing a narcotic drug except in the original stamped package or from the original stamped package. The law does not require direct proof of a purchase, sale, dispensing or distribution of a drug. The statute specifically states that the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found. In other words, if it is proven that the defendant had possession of those drugs and that while in his possession there were no appropriate taxpaid stamps on those drugs, these facts constitute prima facie evidence of a violation of the statute and the jury may find the defendant guilty on that charge, if it sees fit to do so, without requiring any further proof."

Finally, near the end of his charge Judge Holtzoff stated (R. 119-120).

"Now, ladies and gentlemen of the jury, there is one other rule of law that is very important. The Government does not have to show that the defendant Greene actually handled the narcotics, or that he actually sold or delivered any of the narcotics. The law is that any person who aids or abets or assists another in committing a criminal offense may be charged himself as a principal in that offense. If several persons act jointly or in concert and each performs a part that results in

the commission of the offense, then all are equally guilty. For example, if a person drives an automobile to the place where the offense is committed, in order to enable the commission of the offense, and he knows the purpose for which he is driving the car, he is guilty of the offense, to the same extent as the person who actually commits the offense. Or if he performs some other part that leads to the commission of the offense by another, he is equally guilty with that other."

The Sentencing

The jury returned a verdict of guilty on all 15 counts, and on February 10, 1954, petitioner appeared before Judge Holtzoff for sentencing. The judge stated (R. 125-6):

"This is a narcotic offense of an exceedingly aggravated character, because apparently this defendant has been dealing in narcotics, in large quantities for a considerable period of time. Some of the counts involve quantities as large as 40 capsules. There are 15 counts in this indictment.

"William C. Greene, it is the judgment of this court that on counts 2, 4 and 7 you be imprisoned in an institution to be designed by the Attorney General of the United States for a term of not less than 20 months and not more than five years, and that you be fined $500.00, the sentences to run consecutively; that on each of the other counts in the indictment you be imprisoned for a term of 20 months to five years and be fined $500.00, the sentences on the other counts to run concurrently with the sentences on counts 2, 4 and 7. In other words, the aggregate sentence is not less than five years and not more than 15 years, and a $1,500.00 fine."

The Appeal

As a result of petitioner's timely application, the United States Court of Appeals for the District of Columbia Circuit granted petitioner leave to appeal to that Court *in forma pauperis* and appointed present counsel to represent him. In his appeal petitioner alleged a number of errors involving the multiplication of counts on the same evidence, erroneous rulings on evidentiary matters, and prejudicial errors in the charge to the jury. However, the Court of Appeals affirmed, 2-1, with a brief *per curiam* statement by the majority (R. 131-2):

> "The record supports at least 5 of the sentences that were to run 'concurrently with' the 3 consecutive sentences. It therefore supports the aggregate sentence. We need not decide whether it supports the 'consecutive' sentences themselves. *Hirabayshi* v. *United States*, 320 U.S. 81, 85; *Wanzer* v. *United States*, 93 U.S. App. D.C. 412, 208 F.2d 45."

Judge Bazelon dissented, setting forth his reasons for concluding that the convictions on some 9 of the 15 counts (counts 1, 2, 3, 7 to 9, and 13 to 15) were invalid (R. 132-8). He noted particularly that the fragmentation of a single sale into two separate deliveries, each made the basis of three new crimes (counts 4 to 15), was forbidden under the "single impulse" test laid down in *Blockburger* v. *United States*, 284 U.S. 299, at 302. See R. 132-135.[3]

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[3] This portion of the *Blockburger* decision is not at issue here. Indeed petitioner relied upon it in the court below, and does so again here, as invalidating counts 7-9 and 13-15.

The *Blockburger* opinion actually contains rulings on two different questions: (1) When a single course of conduct constitutes two *consecutive* crimes, as opposed to one continuous offense, 284 U.S. at 302-303; (2) When the same act constitutes two or more *simultaneous* offenses, as opposed to only one offense, 284 U.S. at 303-304. It is the second ruling which is challenged in Part I of this brief.

He concluded that this error together with the others affecting counts 1, 2, and 3 was prejudicial and therefore the case should be remanded for resentencing on the six surviving counts alone (R. 138-9).

The petitions for writ of certiorari and for leave to proceed *in forma pauperis*, addressed to this Court, were filed July 5, 1957.

Summary of Argument

I.

A. The rule of *Blockburger* v. *United States*, 284 U.S. 299, 304, that a single narcotics sale may be punished under two or more different statutes so long as each statute "requires proof of an additional fact which the other does not" is again at issue here, as it was in *Gore* v. *United States*, 357 U.S. 386. Indeed, the deficiencies of the "different-evidence" rule are much more apparent in this case than they were in *Gore*, for here the entire trial record is before the Court and the rule can be seen in operation. Yet the *Gore* case itself fails to answer other very basic criticisms of the rule as applied in narcotics cases.

B. A number of factors strongly indicate that Congress did not intend multiple prosecution and punishment of narcotics violators. Not only has it provided very severe punishment for any single violation, but it intended uniformity of punishment, a policy which is thwarted if the prosecutor has the choice of seeking one, two or three sentences for nearly identical sales. The rare cases where he does not have this choice under *Blockburger* involve peculiarities of fact or else illicit conduct by persons, such as doctors, who are authorized to dispense drugs. They do not form a pattern of lesser evil, but are merely arbitrary exceptions. From the very beginning in 1909 the ordinary trafficker

could generally be caught and punished under 21 U.S.C. 174; the later laws were merely intended to plug loopholes and particularly to catch licensed dispensers such as doctor.

There is, then at least a choice of inferences available from this history and from the mere fact that a trafficker is equally punishable under each of three complementary laws. The Code arrangement of those laws and the fact that they were separately enacted are inconclusive factors in resolving the basic issue. What seems incomprehensible about the *Gore* decision is that, faced with a choice of inferences and with these major doubts, the majority opinion chose the harsher alternative. Certainly nothing required that notice, and the humane principles of cases like *Bell* v. *United States*, 349 U.S. 81, seem to suggest a contrary result. At the least if Congress desired multiple punishment it could clearly say so, but until it does say so its silence on the question calls for the application of those principles. In fact in two respects this case is more favorable to their application than *Bell* was: there *are* indications in the legislative history that Congress did not desire multiple prosecution; and the added evil arising from the inevitable failure to secure a one-cent tax stamp or a written order for what could not be imported in any event seems far less than the added evil of transporting a second or third woman into white slavery.

At least in each case the question is the judicial one of resolving for or against the accused doubts as to the intent of Congress in the enforcement of penal laws. The doubts are enhanced here, as seen below, by the fact that under *Blockburger* obscure and seemingly irrelevant technicalities become decisive in vital matters of crime and punishment.

C. 1. If the different-evidence rule does apply, it was violated in this case. The statutes which petitioner al-

legedly violated on two separate occasions (26 U.S.C. 4705 (a), 26 U.S.C. 4704(a), and 21 U.S.C. 174) do not require proof of different facts to support each separate conviction. In fact under counts 4-6 and 10-12, respectively, the government relied on identical evidence to convict petitioner of three sale offenses. That evidence showed that on each occasion petitioner had knowingly helped Barbara Floyd secure and deliver heroin to agent Fialkewicz and that he had also briefly had the narcotics in his own possession. Three separate crimes could not be extrapolated from this evidence, however.

2. The aider and abettor rule (18 U.S.C. 2) does not require separate proof that petitioner participated in the violation of each narcotic law. All that need be shown is that petitioner knowingly associated himself with Floyd, who was the real seller (*Nye & Nissen* v. *United States*, 336 U.S. 613) and that was all that was shown. This evidence might support conviction for facilitating concealment and sale (counts 6 and 12) but it did not prove violation of the tax stamp and written order statutes. Even if it did, as it was the same evidence, it could not be used three times over.

3. Since 26 U.S.C. 4705(a) does not authorize conviction based merely on proof of possession of narcotics, such proof, even as a matter of substantive law, could only support two convictions for each sale. Apart from certain differences between the two statutes, it is also clear that proof of the single fact of possession of unstamped narcotics will equally support conviction under 26 U.S.C. 4704(a) and 21 U.S.C. 174. Moreover, the jury was actively encouraged to base its convictions for violations of both statutes on this same fact. However the different-evidence rule forbids that result. See the opinion of Justice Brennan in *Gore* v. *United States*, 357 U.S. at 397-398.

4. These questions were not squarely presented in either *Blockburger* or *Gore*, but they do arise frequently in narcotics cases involving the different-evidence rule. See, e.g. *Harris* v. *United States*, No. 11, O.T. 1958. The narcotics laws do not in fact *require* proof of an additional fact to support conviction under each law. Moreover, in many cases the government does not in fact produce separate proof of each violation. No matter how the test of the rule is phrased, it was not met here. If the test is technical, the government must accept the burden as well as the advantage of its technicalities. It did not sustain that burden here, and therefore it could not secure more than one conviction per sale. That result also fairly reflects the real nature of the evidence against petitioner.

II.

Without discussion of any substantive issues the Court of Appeals for the District of Columbia Circuit affirmed the entire judgment and sentence of the trial court, even though it assumed that 10 of the 15 counts were actually invalid. It relied on the rule of affirmance announced by this Court in *Claassen* v. *United States*, 142 U.S. 140, 146, 147, that the existence of error affecting some counts is immaterial if there are sufficient good counts to support the actual consecutive sentence; "the presumption of law is that the court awarded sentence on the good count(s) only."

At the time *Claassen* was decided there was no valid authority for such a rule in the appellate review of criminal judgments and sentences. The clearest precedent, *O'Connell* v. *Regina*, 11 Clark & F. 155, 8 Eng. Rep. 1061 (H.L. 1844) flatly condemned the rule for reasons which are equally cogent today. The rule is still merely bad "law taken for granted."

1. The presumption underlying the rule is plainly unwarranted. Trial courts *do* err and they do impose judgment and sentence on bad counts or else there would be no reason for courts of error. Here the Court of Appeals assumed that counts 2, 4 and 7 were invalid—at least two of them were clearly shown to be bad—but those were the very counts upon which the consecutive sentence was based. Moreover, as a general matter trial judges do base their overall sentences on the entire judgment, and therefore partly on each count, no matter how the sentence is distributed among the counts. In this case the trial judge clearly indicated that the sentence was partly based on the large number of counts. See, e.g., *Yates* v. *United States*, 355 U.S. 66. Therefore the presumption is "artificial and unjust" (*State* v. *Kaufman*, 18 N.J. 75, 112 A.2d 721) and it results in the affirmance of a judgment which is partly invalid and a sentence which is partly based on invalid considerations. It also effectively deprives the defendant of any real basis for seeking discretionary resentencing under F.R. Crim. P. 35.

2. The *Claassen* rule results in appellate silence and nonadjudication, with the result that really decisive errors may go undiscovered because only an arbitrarily limited part of the record is closely reviewed. Thus the court below specifically declined to consider three of the counts and did not even specify which five counts it believed valid. The rule also has other drastic consequences, for such matters as parole may be materially affected by the number of valid counts. Paradoxically, however, it also leads to appellate resentencing (which is plainly invalid), on the assumption that the same punishment would be imposed even on a severely diminished judgment.

3. The rule is purely a judicial creature. It has been applied by this Court as a matter of discretion. See, e.g.,

Yates v. *United States*, *supra*. It has been criticized and abandoned by the Second Circuit Court of Appeals (*Hines* v. *United States*, 256 F.2d 561), but other courts of appeals generally apply it. It seems to persist largely out of inertia, but the injustice it causes is widespread. Certainly in this case its application deprived appellant of substantial rights and was prejudicial error.

I

Petitioner's Convictions and Sentences Under Counts 4-6 and 10-12 Constituted Invalid Multiple Punishment.

A. Introduction

Petitioner was convicted of 15 crimes, but some 9 of those convictions (counts 1-2, 7-9, 13-15) are clearly invalid for the reasons stated in Judge Bazelon's opinion below, as well as other reasons which might be adduced. There remain counts 4, 5 and 6 based on the January 21, 1955 sale to Fialkewicz, and counts 10, 11 and 12 based on the January 29, 1955 sale to Fialkewicz.[4]

Those counts present a pattern of prosecution and raise, *inter alia*, questions of multiple punishment which were

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[4] As to these counts Judge Bazelon felt bound to affirm on the authority of *Blockburger* v. *United States*, text above. See R. 132, note 1.

The majority opinion in the court below did not pass on the validity of any specific count (although it is inferable that it agreed with Judge Bazelon at least as to the seven concurrent-sentence counts which he would have reversed). That failure raises its own questions discussed in Part II of this brief.

Other reasons supporting the reversal of the nine counts discussed by Judge Bazelon are summarized in note 4 (pp. 7, 8) of the Petition for Certiorari in this case.

first before this Court in the 1932 case of *Blockburger* v. *United States*, 284 U.S. 299. In *Blockburger* there were simultaneous convictions and consecutive sentences under earlier versions of 26 U.S.C. 4704(a) and 4705(a), respectively, based on a single sale of narcotics. The Court affirmed both convictions and sentences, applying the so-called "different-evidence" test (284 U.S. at 304):

> "Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction violates two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."

Last term in *Gore* v. *United States*, 357 U.S. 386, the Court reaffirmed this holding of *Blockburger* in the face of a square attack upon its statutory and constitutional justification, and on October 13, 1958, it denied rehearing in *Gore*, —— U.S. —— (No. 668, O.T. 1957). The petition in this case made the same attack upon *Blockburger* that Gore did, yet it was granted *without limitation* the very same day that Gore's case was decided adversely to him. Petitioner urges reconsideration of *Gore* and abandonment or at least modification of the *Blockburger* rule. His reasons for doing so are substantially those set forth in the Brief for Petitioner and the dissents (357 U.S. at 392-398) filed in the *Gore* case. Therefore petitioner does not propose to reargue those reasons in full, but merely to summarize them and point out that the majority opinion in *Gore* fails to answer or vitiate them. However, the present case also raises questions concerning the proper scope and application of the *Blockburger* rule, assuming its vitality, and thus demonstrates, more vividly than *Gore*

did, the inadequacies and technicalities inherent in that rule.[5]

B. There Is No Statutory Basis for the Multiple Punishment Petitioner Has Received

The legislative history of the three narcotics laws under which petitioner was convicted was presented to the Court in the *Gore* case briefs. That history, to be sure, reflects a Congressional intent to "turn the screw of the criminal machinery—detection, prosecution and punishment—tighter." *Gore* v. *United States*, 357 U.S. at 390. Specifically, however, it reveals an intent to secure detection and prosecution by the *diversity* of those laws, whereas severe punishment is to be insured by the minimum and maximum sentences applicable under each law *separately*. Moreover, Congress clearly strove to secure uniform punishment for all narcotic offenders, of the same degree. It simply confutes reason to suppose that Congress contemplated the willy-nilly frustration of this careful scheme by permitting prosecutors the choice (or whim) of applying the laws to identical offenders in ones, twos or threes as they saw fit.

However, under the *Blockburger* rule the prosecutor almost invariably has that choice in narcotics cases.[6] Only

[5] *Gore* v. *United States* came to the Court on an abbreviated record as a result of collateral attack under 28 U.S.C. 2255; Gore only attacked the sentences imposed by the trial court. This case arose from a direct appeal on a full record. The convictions, as well as the sentences, are at issue and the entire trial record is open to scrutiny.

[6] Nearly all narcotics in illicit traffic are illegally imported and therefore not tax-stamped. Even if they are domestic products, the defendant's chances of proving that fact are negligible. In prosecuted cases there is virtually never a written order because the nearly invariable means of detection is a feigned purchase by an informer or by a disguised federal agent, as in this case, and

rarely is his ability to treble the counts limited by some quirk of facts or of the statutes themselves. Certainly these exceptions do not fit any clear pattern of lesser criminality. For example, one of a group of defendants may only be chargeable with actual or constructive possession of narcotics and therefore 26 U.S.C. 4705(a), which creates no presumption of guilt based on possession, is not a basis for prosecution. (See, e.g., *Harris* v. *United States*, No. 11, O.T. 1958.) A doctor or a wholesaler may misuse his lawful authority to sell drugs, but the illegal importation and stamp tax laws do not apply to him. (See, e.g., *United States* v. *Doremus*, 249 U.S. 86, and *Direct Sales Co.* v. *United States*, 319 U.S. 703.) A large-scale importer caught at dockside would not be punishable under the stamp tax law, nor would the man who robbed a drugstore. Yet the conduct of these people is fully as heinous as that of the normal trafficker subject to treble punishment.

It is true that there is no evidence of Congressional reaction to multiple punishment, probably because there is no evidence that the practice has ever been clearly brought to the attention of Congress. However, Congress inevitably did know that virtually every narcotics trafficker automatically violates all three provisions at once. See footnote 6, above. It knew this because it knew that the three laws together formed a comprehensive scheme for bringing the trafficker to justice; that all three laws approached the question by indirection in order to avoid then-substantial doubts about the constitutional authority of Congress to punish narcotics sales as such;[7] and that each

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the use of such an order would foil the sale and arrest. Heroin itself, by far the most common illicit drug, is altogether outlawed. It cannot be imported and neither tax stamps nor written orders can be secured for its use. See 21 U.S.C. 173, 18 U.S.C. 1402.

[7] Even as late as 1932, the government brief in the *Blockburger* case (No. 374, O.T. 1931) argued that the laws aimed at violations

law was intended to plug loopholes in the detection and prosecution scheme which were left open by the other two provisions.[8] In this last respect the parallel between those laws and the bank robbery statute considered in *Prince* v. *United States*, 352 U.S. 322, is very strong indeed. Narcotics have been a longer and more elusive federal concern than bank robbery, but the Congressional attempts at solution have been fully as unified in intent.

Differences in the United States Code arrangement or the chronology of enactment of the laws hardly seem decisive in view of these facts. Moreover, with identical intent Congress might alternatively choose to amend a penal law by separate enactment, by additional provision, or by complete republication. In either event it might overlook or fail to comment upon resulting overlaps in coverage. Seemingly, accidental variations of this sort should not govern the important matters of crime and punishment.

Obviously differences do exist between cases of this sort and the "unit of prosecution" cases (*Prince* v. *United States, supra; Bell* v. *United States*, 349 U.S. 81; and *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218). At least two federal courts of appeals have failed to discern any decisive principle in those differences, however. *Gore* v. *United States*, 244 F.2d 763, 767 (C.A.D.C.), and *Yancy* v. *United States*, 252 F.2d 554, 556 (C.A. 6), pet. for cert. pending; see also *Harris* v. *United States*, 248 F.2d 196, 199 (C.A. 8), cert. granted 357 U.S. 935 (No. 11, O.T. 1958). And it is at least clear that such differences

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of specific requirements because Congress did not have the power to punish "sales *qua* sales."

[8] Ironically much of this effort has been directed to policing licensed dispensers—doctors, druggists and the like—rather than the ordinary trafficker, whom the original 1909 act, 35 Stat. 614 (21 U.S.C. 174), covered very effectively. See, e.g., *Nigro* v. *United States*, 276 U.S. 332; *United States* v. *Behrman*, 258 U.S. 280.

as do exist do not inevitably show any factual basis for favoring the man indicted twice under the same act rather than under two different ones. For example, it might be thought a good deal more serious to transport a second woman into white slavery, or to underpay an additional employee for an additional week, than unavoidably to fail to secure a one-cent tax stamp for what could not be legally imported to begin with. At least the factual differences in the first and second type of case are palpable, and are associated with the evil being punished. In the present case, as will be seen below, the factual differences are in the nature of irrelevant technicalities, or at most "merely different labels (for) the same thing" (*Gore* v. *United States*, 357 U.S. at 389).

The "rule of lenity", particularly as stated in *Bell* v. *United States*, *supra*, does not seem to depend upon matters of statutory arrangement; neither does it assume that felons "carefully read the penal code before they embark on crime" (349 U.S. at 84). On the contrary, it appears to rest on the "presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of harsher punishment." (Id., at 83.) The very point at which the "presupposition" becomes decisive, this Court said in *Bell*, is where Congress has failed clearly to indicate its desire for multiple punishment. Certainly there was no such indication in the case of the narcotics laws. Indeed there was much in their history indirectly suggesting an intent *not* to punish under all three laws simultaneously. Clearly, if Congress had in fact correlated all three requirements, now pronounced by separate laws, in a single enactment (see *Gore*, 357 U.S. at 392-393), this Court would have no doubt of its desire to punish traffickers triply. Congress' failure to do such an unmistakable thing, knowing that all three laws were on the books and covered the same traffic, is itself persuasive that it had no such desire.

It does not invite this Court into the field of penology (*Gore*, 357 U.S. at 393) to urge that here, as in the *Bell* case, reasonable doubts should be resolved in favor of lesser punishment of the accused, and to suggest that a rule which arose out of the technicalities of common law criminal pleading as an antidote to equally technical rules for criminal escape (see *Rex* v. *Vandercomb & Abbott*, 2 Leach 708, 168 Eng. Rep. 455 (1796)), is no longer a sound basis for condemning a man to arbitrary and excessive punishment. It seems utterly wrong to act as if our jurisprudence had not passed that era. The different-evidence rule, as will be seen below, depends upon technicalities (and irrelevant technicalities) of evidence which were long ago recognized as inconsequential in civil cases. Lastly, since petitioner does not primarily press the constitutional argument, it seems clear that if Congress did intend such results, it need only say so clearly. Certainly Congress has not done so yet and this Court ought not to presume that it would do so.

C. The Different-Evidence (*Blockburger*) Rule Itself Forbade Multiple Punishment in This Case

On the assumption that the *Blockburger* rule *is* applicable, however, the limitations of that rule were violated in this case.[9] In point of fact the same evidence was relied upon to prove three offenses against petitioner for each sale of narcotics to agent Fialkewicz. Proof of each offense rested on inference and projection from exactly the same core of facts.

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[9] Related questions are presented in other cases to be argued this term: *Ladner* v. *United States*, 355 U.S. 282, petition for rehearing granted 356 U.S. 969 (No. 2, O.T. 1958); *Harris* v. *United States* (No. 11); *Wooday* v. *United States* (No. 135); *Heflin* v. *United States* (No. 137).

Moreover, the statutes relied upon for conviction permit such extrapolated proof. To be sure, each provision of the narcotics laws denounces somewhat different conduct and, of course, it is open to the government to put in explicit proof of each element under each statute. But the statutes do not *require* such strict proof, and what they *require* is the decisive test under the *Blockburger* rule.

More is at issue here than a mere mistaken choice by the prosecution to use available evidentiary shortcuts. For the truth is that the government had no case against petitioner other than that he helped Floyd to get the heroin that Fialkewicz said he desperately needed. Petitioner thereby facilitated two sales in violation of 21 U.S.C. 174 (Counts 6 and 12). Had the government contented itself with prosecution on that basis it would have secured just punishment and it also would have avoided the prohibitions of the *Blockburger* rule.

1. *The Government Relied on the Same Evidence to Prove Three Separate Offenses*

The evidence connecting petitioner with the transactions of January 21 and 29, 1955 has been described in the Statement above, page 10. In essence it showed that on each date Floyd brought petitioner money from Fialkewicz and asked him to secure heroin capsules for the supposed addict; that he went out and later returned with some or all of the requested capsules, turning them over to Floyd; and that on several occasions he then drove her to the rendezvous with Fialkewicz where, out of his presence (R. 45), she delivered the capsules. He was unquestionably aware on these dates that the capsules were going to a third person,[10] although twice previously Floyd had acted entirely on her own, apparently using petitioner as an

[10] He later told Fialkewicz that Floyd had delivered the drugs which he got for the agent. See R. 88.

unwitting source of supply. She said she got the drugs for Fialkewicz because she "felt sorry" for him (R. 45) and certainly petitioner's own motives as a friend of Floyd derived from and paralleled hers. He evidently did not profit from the transactions and in fact it seems clear that he used the purchase money for just that purpose, to buy the capsules from someone else for Fialkewicz.

This evidence might better have supported the view that Floyd and petitioner helped Fialkewicz buy drugs from an unnamed supplier—that they were his *purchasing agents;* but that would have eliminated the counts based on the written order statute, 26 U.S.C. 4705(a). So the government chose to present its evidence to the jury as proof that they themselves sold drugs to Fialkewicz (R. 5-8, 11, 12). Two basic facts, or factual aggregates, constituted the case against petitioner: first that at one time he had the drugs in his possession before giving them to Floyd, and second that, although aware that she was taking the drugs to Fialkewicz, he gave her active assistance. However, he was not the actual seller; Floyd was. He was not present when she met with Fialkewicz and gave him the drugs "not in or from an original stamped package" and "not in pursuance of a written order".

This proof might support one conviction for each sale based either on petitioner's role as an aide and abettor or on his possession of the narcotics. But it did not separately prove three or even two crimes for each sale.

2. *The Aider and Abettor Rule (18 U.S.C. 2) Did Not Require Separate Proof of Each Statutory Offense Charged*

The trial judge's charge on aiding and abetting (a "rule of law that is very important") has been quoted in full above, pages 14, 15 (R. 119-120). He told the jury that

the government did not have to prove that petitioner actually handled or sold or delivered the narcotics, but that anyone who assisted another in committing a criminal offense is guilty as a principal. Thus, he said in a pointed example, driving another person to the place where an offense is committed, knowing the purpose for which the car is being driven, is sufficient for conviction, as is the performance of any other part that leads to the commission of an offense.

This instruction, particularly after the earlier statement that "*all traffic* in narcotics outside of the channels prescribed by law . . . is criminal and illicit (R. 114), completely glossed the fact that the single fact of assistance to Floyd was being claimed as the basis for three separate convictions and sentences. The jury was told that chauffeuring Floyd was sufficient to convict. But chauffeuring is one act, and it does not separately prove sales in violation of three different statutory requirements. Nor does it prove that petitioner actually knew Floyd would sell in violation of the three laws. Perhaps he did know, because the capsules contained heroin (see footnote 6, above), but even that possibility rests on the single fact that heroin was involved.

As applied here and as authoritatively construed, 18 U.S.C. 2, did not require separate proof that petitioner knew of and assisted each violation of each substantive statute. It merely required proof that he had a general "purposive attitude" towards Floyd's illegal venture (*United States* v. *Peoni*, 100 F.2d 401, 402, C.A. 2), or that he consciously shared in her criminal act (*Nye & Nissen* v. *United States*, 336 U.S. 613, 620).

> "In order to aid and abet another to commit a crime, it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as some-

> thing that he wishes to bring about, that he seek by his action to make it succeed.' L. Hand, Jr., in *United States* v. *Peoni* (C.C.A. 2d N.Y.), 100 F.2d 401, 402" (Id., 336 U.S. at 619).

Proof that an accused associated or shared or participated "in some sort" in the criminal act of another does not separately establish his participation in each extrapolated offense. The act-offense dichotomy becomes important under the different-evidence rule. See Kirchheimer, *The Act, the Offence and Double Jeopardy*, 58 Yale L.J. 513 (1949). It is separate proof of each *offense* which the rule requires. See *Blockburger* v. *United States*, 284 U.S. 299, 304.

In a sense the aider and abettor law is merely a rule of the least proof necessary for conviction of a substantive offense, here an offense against the narcotics laws. The same proof cannot be used three times over to triple the conviction, however. Yet the jury was in effect instructed that it could be. Since 21 U.S.C. 174, contains its own aider and abettor rule punishing anyone who "facilitates concealment and sale" of illegally imported narcotics, it seems fair to say that this was the only offense actually shown by petitioner's assistance to Floyd. Certainly there was no separate evidence linking him with her violations of the specific requirements of the other two statutes.

3. *The Government Could Not Base Three Separate Convictions on the Single Fact of Petitioner's Possession of Narcotics*

Two of the three statutes petitioner was charged with violating contain presumption clauses permitting conviction based on proof that the narcotics were in the defendant's possession. Specifically 26 U.S.C. 4704(a) provides that "the absence of appropriate taxpaid stamps from

narcotics drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found", and 21 U.S.C. 174 provides: "Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the Jury." (Section 4705(a) of Title 26 U.S.C. has no similar provision.)

Relying on the above provisions the government introduced proof by Floyd that petitioner had briefly had the heroin capsules in his possession before turning them over to her. The trial judge viewed this evidence as perhaps decisive, for in denying petitioner's motion for acquittal he referred to this aspect of Floyd's testimony and called her "the complete witness here" (R. 107). In his instructions (quoted above, pp. 13, 14) he emphasized the statutory presumptions quoted above and the jury was thus encouraged to treat such proof as conclusive. Presumably any jury seriously attending to those instructions would do just that, in view of the judge's comparatively perfunctory treatment of the fuller elements of proof under each statute (see R. 114-117) and the ambiguities inherent in the government's overall case.

However, unexplained possession of narcotics is not a proper basis for conviction under the written order statute, 26 U.S.C. 4705(a), and therefore would not support conviction under counts 4 and 10 based on that statute. Moreover, it may be doubted whether on the basis of Floyd's testimony that the drugs were in his possession, the presumption clause in 26 U.S.C. 4704(a), authorized petitioner's conviction under counts 5 and 11 for selling drugs to Fialkewicz "not in or from the original stamped package" (R. 6, 7). Certainly he was not the person in whose

possession the capsules were "found" by federal agents.[11] Certainly, too, it is doubtful that the presumption carries so far as to permit a person's conviction, based on past possession alone, for a later sale between two other parties. This Court has held that the validity of such presumptions depends upon a "rational connection between the fact proven and the ultimate fact presumed" (*Yee Hem* v. *United States*, 268 U.S. 178, 183) and it has repeatedly indicated that there are limits to their probative value. See, e.g., *Casey* v. *United States*, 276 U.S. 413, and *Yee Hem* v. *United States*, *supra*, 268 U.S. at 183, quoting *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U.S. 35, 42. See also *Luria* v. *United States*, 231 U.S. 9.

Apart from these differences, however, it is evident that both statutes, 21 U.S.C. 174 and 26 U.S.C. 4705(a), authorize conviction based on the same evidence—proof of possession of unstamped narcotics. This was the very point made by Justice Brennan in his dissent in *Gore* v. *United States*, 357 U.S. 386, 398: "Therefore under the statutes proof of the single fact of possession of unstamped narcotics suffices to convict the defendant of offenses under either §4704(a) or 174." He concluded that the judgment in that case should be reversed under the *Blockburger* rule itself. That position seems unanswerable, for, it bears repeating, the test laid down by *Blockburger* is not what evidence the statutes permit, but what they actually *require* for conviction. Whether or not more than the required minimum is shown to the jury is a question of trial tactics

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[11] Compare *State* v. *Jenkins*, 321 Mo. 1237, 14 S.W. 2d 624; *State* v. *Marshall* (Ohio Mun.), 105 N.E. 2d 891; and *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U.S. 79, construing the word "found" in a venue statute. The language of 21 U.S.C. 174 is significantly different in this respect. Of course, tax stamps can be removed from a package and that fact may account for the requirement that a defendant be actually "*found*" with unstamped drugs in his possession.

and available evidence, not of indispensable proof. However, the result would be the same in either event, for here the Government in fact relied upon this single fact of possession and the jury was in fact instructed that it might convict on that basis alone. (Actually Floyd did not even testify that the drugs lacked stamps at the time they were in petitioner's possession.)

It hardly requires demonstration that the statutory presumptions themselves are not evidence. Rather they "give to the facts from which the presumption is drawn an artificial value to some extent." *Yee Hem* v. *United States*, 268 U.S. 178, 185. They place upon the defendant the burden "of proving facts" to overcome the inferences ("the artificial value") drawn from presumptions themselves. *Casey* v. *United States*, 276 U.S. 413, 418; see also *Roviaro* v. *United States*, 353 U.S. 53, 63. It does not seem necessary to decide whether the two statutes, in view of these clauses, have the relationship of includible offenses subject to merger at the time of judgment and sentence; for it is at all events clear that the same evidence suffices to convict under both.

Accordingly, there was not separate proof to support counts 5 and 11 and none at all to support counts 4 and 10, based on the fact of possession itself. Only counts 6 and 12 were adequately supported by such proof.

4. *If Blockburger Is the Law, It Forbade Multiple Convictions Here*

Questions of proof under the different-evidence rule were dealt with by the Court only summarily in *Blockburger* v. *United States*, 284 U.S. 299 and not all in *Gore* v. *United States*, 357 U.S. 386. In both cases it was contended that the rule itself was bad. Moreover, defendants in those cases were the actual sellers and there was specific proof that

each personally had violated the applicable statutory requirements.[12] That is not the case here, where the government's theory of proof under the companion comes down to "merely different descriptions of the same offense" (*Gore* v. *United States*, 357 U.S. at 392), based on the same evidence. Such proof is common in narcotics cases. See, e.g. *Harris* v. *United States*, No 11, O.T. 1958.

An examination of the narcotics statutes themselves and of the manner in which the government frequently seeks to prove "violations" of their separate "requirements" (*Blockburger* v. *United States*, 284 U.S. at 304) reveals the deficiencies of the different-evidence rule. It can hardly be denied that most illicit dealings in narcotics do in fact offend all three statutory requirements, because neither tax stamps nor licensed written orders are obtainable for contraband drugs. Yet practical probabilities are not substitutes for the proof required of the United States as prosecutor. It must bring home to the defendant by different proof each offense which it charges against him. If it is unable, or fails, to do so, it must content itself with convictions under the basic statute, 21 U.S.C. 174, and accept the normal rule of one punishment for one act having only one evil consequence. In short, it must accept the burden of the different-evidence rule as well as its advantages if it is to rely on that rule. It did not sustain that burden here.

Petitioner's convictions under counts 4, 5, 10, and 11 should be reversed.

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[12] See Brief for Petitioner in the *Gore* case (No. 668, O.T. 1957) pp. 7, 8, and the record in *Blockburger* (No. 374, O.T. 1931) pp. 12-14. In *Blockburger* the trial judge's charge did not even mention the presumption arising from possession of unstamped drugs (R. 30, 31). Nor did this Court's opinion.

Of course, the *Gore* case arose on collateral attack and the evidence and charge to the jury were not directly before the Court.

II

The Court of Appeals Erred in Refusing to Decide the Validity of Petitioner's Convictions and Thereafter to Remand the Case for Resentencing on the Valid Counts Alone.

Independently of the previous contention, there exists a second major error in this case—one that stems directly from the action (or more properly, the non-action) of the Court of Appeals. That court affirmed the entire 15-count judgment and sentence imposed upon petitioner, even though it assumed that no more than some 5 unspecified concurrent-sentence counts were valid.[13] (In what follows petitioner adopts the same assumption, although if his substantive contentions above are correct, the record in fact only supports two counts, nos. 6 and 12.)

The rule relied upon to sanction this result was given its fullest statement by this Court in *Claassen* v. *United States*, 142 U.S. 140, 146, 147, where a general sentence was imposed upon a five-count conviction. The Court held that the first count was valid and that it alone was sufficient to support the judgment and sentence; therefore, it was unnecessary to consider other alleged errors:

> "In criminal cases, the general rule, as stated by Lord Mansfield before the Declaration of Independence, is 'that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad.' *Peake* v. *Oldham*, Cowp. 275, 276; *Rex* v. *Benfield*, 2 Burr. 980, 985. See also *Grant* v. *Astle*, 2 Dougl. 722,

[13] Specifically the court below held (R. 131-132): "The record supports at least 5 sentences that were to run 'concurrently' the 3 consecutive sentences. It therefore supports the aggregate sentence. We need not decide whether it supports the 'consecutive' sentences themselves. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Wanzer* v. *United States*, 93 U.S. App. D.C. 412, 208 F.2d 45."

730. And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only. *Locke* v. *United States*, 11 U.S. 7 Cranch. 339, 344; *Clifton* v. *United States*, 45 U.S. 4 How. 242, 250; *Snyder* v. *United States*, 112 U.S. 216; *Bond* v. *Dustin*, 112 U.S. 604, 609; 1 Bishop, Crim. Proc. §105; Wharton, Crim. Pl. & Pr. §771."

Since the *Claassen* case this rule has been applied in federal criminal cases virtually automatically. Yet it is an unfair and unsound rule of criminal procedure. Moreover, it seems relevant—albeit not conclusive—to note that at the time of *Claassen* there was no real authority for the rule at all, but merely a series of *dicta* drawn almost entirely from civil cases where utterly different considerations prevailed.[14] The rule is commonly traced to Lord Mansfield, as indi-

[14] Of the three decisions by Lord Mansfield, cited in the *Claassen* opinion, as quoted above, *Peake* v. *Oldham*, Cowp. 275, and *Grant* v. *Astle*, 2 Doug. 722 were civil cases in which precisely the opposite rule prevailed, and his remarks were really a lamentation of that fact. They were dicta twice compounded, therefore, since they had no relevance to the case at bar and they falsely described a rule supposed to obtain in criminal cases. Finally, all three were *nisi prius* cases. See text below.

The four cited earlier decisions by this Court were also civil cases in which the nature of the remedy independently required affirmance even if only one count was valid. *Locke* v. *United States*, 7 Cranch 339, *Clifton* v. *United States*, 4 How. 242, and *Snyder* v. *United States*, 112 U.S. 216, were all actions to condemn or secure forfeiture of particular property. The government alleged alternative grounds for forfeiture, but any one of those grounds would have sufficed. *Bond* v. *Dustin*, 112 U.S. 604 was governed by an Illinois statute specifically requiring affirmance if any one count supported the trial court's judgment.

cated in the *Claassen* opinion, but all three of his decisions on the question were rendered in *nisi prius* courts on motions to arrest judgment. It was therefore timely for Lord Mansfield to notice the errors complained of and restrict the judgment to the good counts alone. The decisions were merely unnecessarily broad statements by the court of its intention to do so. Thus, as Lord Denman said when the question of the rule's validity first came to the House of Lords, "My Lords, this whole doctrine has arisen upon a single remark of Lord Mansfield, twice repeated." (*O'Connell* v. *Regina*, 11 Clark & F. 155, 371, 8 Eng. Rep. 1061, 1143.) The remarks themselves ". . . were needlessly and inconsiderately uttered, hastily adopted, and applied to a stage of proceedings in which they are not correct in point of law." (Id., 11 Clark & F. at 383, 8 Eng. Rep. at 1147.)

The stage "in which they are not correct in point of law" is the appellate stage. When the question first came before the House of Lords, in 1844 (*O'Connell* v. *Regina*, *supra*), Lord Mansfield's views were flatly disapproved for courts of error. Yet 45 years later this court adopted those *dicta* in the *Claassen* case, declining to accept the reasoning and result of *O'Connell* case. That decision deserves reconsideration, for the *Claassen* rule is defective in its rationale, inconsistent in its application, unjust in its operation, and drastic in its consequences for the criminal defendant. Nothing commends it, then, except an unworthy notion of judicial "convenience", and every relevant consideration condemns it as unsound and unfair. Not only *O'Connell* v. *Regina*,[15] but recent American decisions have thoroughly and unanswerably criticized the rule.

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[15] *O'Connell* v. *Regina*, 11 Clark & Finelly 155, 8 Eng. Rep. 1061 (1844), was a review by writ of error of the convictions of the Irish patriot Daniel O'Connell and his associates on 11 counts of seditious conspiracy. Because of the importance of the case, some nine judges were summoned to advise the House of Lords. All nine,

1. *The presumption which underlies the Claassen rule is unwarrantable in fact and in law.* Under the *Claassen* rule, "the presumption of law is that the (trial) court awarded judgment on the good count only" (142 U.S. at 147). That presumption is clearly not warranted here, for the District Court overruled petitioner's motion for judgment of acquittal (R. 107) and it pronounced judgment and sentence on each count separately. It imposed consecutive sentences on three particular counts (Nos. 2, 4, 7), and there is no basis of record for assuming that that arrangement was purely fortuitous. In any event, the court below certainly did not adopt the above presumption, for it actually assumed that all three of those counts might be bad ("We need not decide . . ." R. 131). Judge Bazelon demonstrated that two of them, Nos. 2 and 7, were indeed bad. See R. 132-135, 137-138. Therefore, in this case, as in *O'Connell* v. *Regina*, "(t)his would be to presume what the record negatives" (Lord Cottenham, 11 Clark & F. at 393, 8 Eng. Rep. at 1151).[16]

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plus five Lords "learned in the law", heard lengthy argument, considered the case for two months, and then delivered separate opinions on the question at issue here. All conceded that certain of the counts were defective and also that the question before them had never been decided by a court of error. Neither before nor since that case has the *"Claassen"* rule been given such full and articulate consideration. Very little has been added for or against the rule since the *O'Connell* case.

Seven of the nine judges believed the rule valid; Justice Coltman and Baron Parke disagreed. The House itself disapproved the rule by a vote of 3 to 2, Lords Denman, Coltenham and Campbell constituting the majority. The five opinions of these judges and lords are the ones quoted in this brief, there having been no "opinion of the court", as such.

[16] Speaking of the presumption which the rule requires an appellate court to make, Lord Denman said ". . . I feel an unconquerable repugnance to that; because I cannot be ignorant that I should be setting up a presumption in direct contradiction to notorious fact." 11 Clark & F. at 367, 8 Eng. Rep. at 1141.

Of course, the presumption is unreal in any case. It assumes that the trial judge saw error in the record and disregarded it in his judgment, even though he failed to correct it or note it on the record. If applied generally the reasoning of the rule would dispense with all appellate courts.[17] The doctrine underlying it is, as the Supreme Court of New Jersey said recently "artificial as well as unjust and not consonant with the efforts of our courts to protect the fundamental rights of the accused." *State* v. *Kaufman*, 18 N.J. 75, 82, 112 A. 2d 721, 725.

The court in the *Kaufman* case unanimously disapproved the *Claassen* rule in cases where a general sentence has been imposed, but it added that the problem could be avoided if the trial court sentenced separately on each count (18 N.J. at 83, 112 A. 2d at 725). In fact the problem could be minimized, but separate sentencing does not alter the likelihood that even where such sentences are imposed the actual punishment (consecutive sentences and fines) bears a direct relationship to the overall number of counts of which the defendant stands convicted. The presumption that it does not bear that relationship is, as Lord Denman said, "against the common probability of every case" (11 Clark & F. at 367, 368, 8 Eng. Rep. at 1141). To suppose otherwise would be to contend that the degree and incidence of proven criminality, indeed the very fact of conviction itself, does not affect punishment. On the contrary, those are the first considerations of any sentencing judge. In the present case the trial judge said the case was an "'exceedingly aggra-

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[17] "This reasoning would be quite just if Courts of Law were infallible; but as all writs of error proceed on the ground of the fallibility of human judgment, the presumption that the Court has not committed error is not a safe one to act upon, and may be directly at variance with the fact."

Mr. Justice Coltman in *O'Connell* v. *Regina*, 11 Clark & F. at 271, 8 Eng. Rep. at 1106.

vated one . . . ' There are 15 counts in this indictment" (R. 125). In *Yates* v. *United States*, 356 U.S. 363, 366, this Court said:

> "Reversing a judgment for contempt because of errors of substantive law may naturally call for a reduction of the sentence based on an extent of wrongdoing found unsustainable in law."

In a very real sense, then, every sentence imposed on multiple counts is a general or gross sentence; inevitably the overall actual sentence, however distributed among the counts, is referable to all of them. The *Claassen* rule ignores the possibility that the defendants have been punished "for charges which do not amount to crimes in the eye of the law, and for crimes of which they have not been lawfully convicted" (11 Clark & F. at 413, 8 Eng. Rep. at 1158).

Fundamental as this truth is, it is not the end of the matter, for the rule leads to other injustices.

2. *The Claassen rule results in appellate non-adjudication and yet also in appellate resentencing.* It is ironical at least that the same rule of law should lead an appellate court both to desert its normal duty—review of errors—and to do the very thing most clearly forbidden to it—resentence the appellant. That the *Claassen* case has this twofold effect can be seen from this very case, however.

(a) Clearly the court below did not undertake complete review of this case. It explicitly refused to decide whether or not the record supported the consecutive-sentence counts. Concerning the remaining 12 counts it contented itself with the bare holding that "at least" (R. 131) 5 of them were valid, but it did not specify which 5, and it seems a fair inference that it did not actually determine the validity of the remaining 7 counts. At least it did not say or imply that it did so.

The matter is more than academic. For unless the court reviews the entire case, testing out each conviction in the premise that it may affect the judgment and sentence, the court may overlook errors which so vitiate the entire proceeding as to require reversal. In *O'Connell* v. *Regina,* Lord Denman pointedly noted this possibility that unexplored errors might survive such compartmentalized review. 11 Clark & F. at 376-378, 8 Eng. Rep. at 1144-1145.[18]

The unfairness to the appellant goes further. First, he is deprived of any meaningful opportunity to seek reduction of his sentence under Federal Rule of Criminal Procedure 35. On the record the entire judgment has been affirmed by the appellate court. Yet it may contain serious errors which, if exposed, would warrant discretionary resentencing, even if they did not require outright reversal. The matter may be more serious, however. If petitioner's previous contentions in this brief are correct, only two counts were valid in the entire judgment. However, the trial court imposed consecutive sentences on three counts.

Secondly, those errors, if exposed, might materially affect a defendant's parole chances, his standing in society, and even his punishment in the event that he is subsequently convicted again and sentenced as a repeating offender. It seems merely elementary truth to say that a criminal accused has a right to be adjudged and sentenced on a record free from error. The future consequences of denying him that right may be very palpable.

(b) To hold, as did the court below, that even if 10 of petitioners 15 convictions were invalid his "aggregate sentence" should stand is to engage in appellate resentencing.

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[18] A minor but noteworthy result of such non-adjudication is the very human tendency to try to convert this Court into a general court of error which will review those questions which the court below evidently refused to consider, rather than merely those questions of particular importance warranting review by certiorari.

The Court of Appeals in effect assumed that such errors could not affect the punishment already imposed and therefore affirmed. Yet,

> " . . . it is not for a Court of Errors to enter into any consideration of the effect which such error may have produced. It has no power to alter the sentence, and can form no opinion of the propriety and justice of it from mere inspection of the record, which is all the judicial knowledge it has of the case. Upon what ground is it to be assumed, in any case, that the Court below, if aware of the legal insufficiency of any of the counts, or of the findings upon them, would have awarded the same punishment? In many cases it probably would not do so, but in many it as certainly would not."
>
> (Lord Cottenham in *O'Connell* v. *Regina*, 11 Clark & F. at 395, 8 Eng. Rep. at 1151; see also remarks of Baron Parke, 11 Clark & F. at 298-9, 8 Eng. Rep. at 1116, and of Lord Campbell, 11 Clark & F. at 420, 8 Eng. Rep. at 1161).

In *State* v. *Kaufman, supra*, 18 N.J. at 83, 112 A. 2d at 725, the late Chief Justice Vanderbilt of New Jersey noted that affirmance under the *Claassen* rule "in effect . . . would constitute a substitution of the appellate court's decision as to the proper sentence upon the valid count for that of the trial judge in whom such power and duty resides." See also *Commonwealth* v. *Hull*, 296 Mass. 327, 5 N.E. 2d 565, and *State* v. *Hollman*, 232 So. Car. 489, 102 S. E. 2d 873. There is no avoiding that conclusion, for, as pointed out above, even Rule 35, F. R. Crim. P., is realistically unavailable to the defendant if mere affirmance on a subjunctive basis is all he secures.

3. *Claasen is a purely judicial rule. It should be abandoned.* The rule applied by the court below is merely "law

taken for granted" having no basis other than "the mere statement and re-statement of doctrine" (Lord Denman, 11 Clark & F. at 372, 373, 8 Eng. Rep. at 1143). It is bad law based on transparently bad doctrine. It goes squarely contrary to reason and experience, and it is deeply against the grain of our criminal jurisprudence. It resolves substantial doubts arising from the trial court's proceedings against the defendant. It is drastically prejudicial to his rights.

Considering the evils of the rule at least one Circuit Court of Appeals, the Second, has refused to follow the rule even where the trial court imposed separate concurrent sentences on a multiple-count conviction:

> "Obviously the Claassen rule, especially as it applies to cases involving concurrent sentences, presumes that a district judge does and should give the same punishment on one-count convictions as he does on multicount convictions, and that a defendant's punishment is no greater so long as he must stay in prison for the same period of time. The validity of this presumption is questionable. See, e.g., *Yates* v. *United States*, 356 U.S. 363, 78 S.Ct. 766, 2 L.Ed. 2d 837. Moreover, it does not take into account the stigma which attaches to an accused from the conviction of two or more crimes, rather than one, or the practical effect on a prisoner, now that the parole system is so widely applied. In view of these facts we feel constrained to entertain an appeal such as this whenever the nature of the error committed below or other circumstances suggest that the accused might have received a longer sentence than otherwise would have been imposed, or that he has been prejudiced by the results of the proceedings." (*Hines* v. *United States*, 256 F. 2d 561, 563.)

The *Hines* opinion also noted the fact that this Court has not applied the *Claassen* rule with any consistency. In a series of decisions both this Court and the court below have remanded cases for resentencing on the surviving valid counts alone. *Yates* v. *United States*, 355 U.S. 66; *Nilva* v. *United States*, 352 U.S. 385; *Husty* v. *United States*, 282 U.S. 694; *Putman* v. *United States*, 162 U.S. 687; *Balleu* v. *United States*, 160 U.S. 187; *Washington* v. *United States*, 98 U.S. App. D.C. 100, 232 F. 2d 357; *Nelms* v. *United States*, 94 U.S. App. D.C. 267, 215 F.2d 678; *Fulton* v. *United States*, 45 App. D.C. 27. Yet there is no discernible ground for distinguishing these cases from the far larger group in which the *Claassen* rule is applied.

There have thus arisen two contradictory lines of cases, the minority representing a more sensible and humane rule of appellate action. The *Claassen* rule is not only a judicial creation, it is evidently one of discretionary application. However, unless and until this Court squarely disapproves the rule, in the manner that the New Jersey court did in *State* v. *Kaufman, supra,* it will continue to be applied by the courts of appeals in a large number of cases, with the unjust results shown on the record in this case. Its application to this case was prejudicial error.

Conclusion

The judgment of the Court of Appeals should be reversed.

Petitioner also submits that the District Court's judgment and sentence as to counts 1-5, 7-11, and 13-15 should be reversed and the case should be remanded to that court for resentencing on counts 6 and 12 alone.

In the event that this Court declines to adopt or to consider the contentions in Part I of this brief, the entire case should be remanded to the Court of Appeals with

instructions to reconsider the case and, if it finds error invalidating any count in the District Court's judgment and sentence but not warranting a new trial, to remand the case for resentencing by the District Court on the valid counts alone.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 134

WILLIAM C. GREENE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 134

WILLIAM C. GREENE,

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UNITED STATES OF AMERICA,

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PETITIONER'S REPLY BRIEF

Three matters are discussed in this reply brief:

(1) The Court's decision of December 15, 1958, in *Ladner* v. *United States*, No. 2, this term, which respondent does not discuss in its brief;

(2) Respondent's apparent confusion about what the different-evidence (*Blockburger*) test is and what burden it places on the prosecution; and

(3) The significant degree to which respondent's own defense of the *Claassen* rule as applied below embodies the vices of the rule itself.

I.

This Court's Recent Decision in Ladner v. United States Further Exposes the Arbitrariness of the Gore Decision.

Since *Gore* v. *United States*, 357 U.S. 386, this Court has decided *Ladner* v. *United States*, No. 2, this term, another case applying the "rule of lenity" even to crimes of violence. That decision further emphasizes the arbitrary and exceptional nature of *Gore*. It obviously may be said that the distinction between the two cases is that only one code provision applied to Ladner, whereas three apply to the narcotic offender. But that distinction, as we have previously pointed out, is frequently one without a difference and in any event is a weak, mechanical basis for deciding whether the same conduct authorizes single or multiplied punishment. Moreover, it raises the very real possibility that even a narcotics offender who is "lucky enough" to be indicted twice under one code provision, rather than once under two provisions as petitioner was, will receive only half as heavy a sentence. (See *Yancy* v. *United States*, 252 F.2d 554 (C.A. 6), petition for certiorari now pending, No. 64 Misc., this term, which raises that question, in the light of the *Gore* decision.[1] Certainly *Ladner* and the earlier "rule of lenity" cases suggest that result; yet the choice between these two basic patterns of prosecution is open to the U.S. Attorney in virtually every narcotics case. Of course, the penal consequences to the accused of the particular choice made may be drastic indeed.

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[1] Yancy was indicted twice under 21 U.S.C. 174, for purchase and sale of the same illegally imported heroin. The Court of Appeals, per Judge (now Justice) Stewart, held that his claim of invalid double punishment was foreclosed by *Blockburger* v. *United States*, 284 U.S. 299, but the *Gore* decision, particularly as viewed in the light of *Ladner*, shows that it was not. The decisive factor seems to be whether the conduct is condemned by one statute or by two.

However, the number of statutes technically violated (*Gore*), as with the number of federal officers technically assaulted under 18 U.S.C. 254 (*Ladner*), frequently "will have little bearing upon the seriousness of the criminal act." *Ladner* v. *United States*, slip opinion, p. 7. Particularly is that true when, as here, the statutes all have the same purpose and the convictions may rest on the same evidence. The *Ladner* case, its implications and its reasoning, pointedly show the need for reconsidering *Gore* along the lines previously suggested by petitioner.

II.

The Blockburger Rule Requires Different Evidence to Support Each Conviction, Not Merely Different Statutory Language or Divergent Inferences From the Same Evidence.

The Government earnestly contends (Resp. Br. 17-20) that the evidence "required" to convict under each of the narcotics laws is measured by the relevant statutory language, and since this language differs under each statute, the different-evidence test is thus satisfied. That obviously is not so, however. If the statutory language were conclusive upon the question there would be no need at all for such a test. The double jeopardy clause would squarely cover the unlikely event of prosecution under two statutes framed in identical terms. Obviously the test refers to *evidence*, as its name and its classic formulation show. (*Blockburger* v. *United States*, 284 U.S. 299 at 304.) What is *required* is that the minimum evidence necessary to support conviction under each statute include proof of at least one different fact. (Of course, in urging reconsideration of *Gore* petitioner has also contended that the different fact should be one of substance, not of form alone.)

Moreover, the Government's argument is demonstrably wrong in view of the normal proof supplied under 21 U.S.C. 174, for example. It is safe to say that in very few such cases has the Government even tried to prove that in point of fact the drugs were illegally imported and the defendant knew them to be so. What it relies upon, as in this case, is a "not * * * illogical" inference (*Yee Hem* v. *United States*, 268 U.S. 178, 184)[2] arising from proven possession of the drugs, normally unstamped. If it is also "not * * * illogical" to infer from the same fact that petitioner participated in a sale of the unstamped drugs to a third person, *after* they left his possession,[3] that reasoning surely does not mean that new and different evidence was required (or offered) to establish the second crime. To the contrary. Nor does it matter whether the presumption is statutory in origin. The inference that petitioner, having aided Floyd to secure drugs in response to Fialkewicz's feigned plea, knew she would deliver them to him in violation of *three* different legal requirements, is nonetheless merely an inference with three variations, drawn from the same evidence.

However, the different-evidence rule forbids the use of such evidence to multiply punishment. It bears repeating that the Government seems very eager to grasp the advantages of the rule but unwilling to accept its correlative burdens.

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[2] Compare the standard of proof required even in civil cases where knowing membership in a politically suspect organization is the issue, e.g., *Wieman* v. *Updegraff*, 344 U.S. 183. It is at least absurd to suggest that such an inference as *Yee Hem* permits constitutes evidence within the meaning of the rule.

[3] The logic of this inference is even more doubtful. See *Tot* v. *United States*, 319 U.S. 463, and Pet. Br. 34-35.

III.

The Very Assumptions Which Respondent Is Forced to Make in Defense of the Claassen Rule as Applied Below Reveal the Defects of That Rule.

We believe the Government has misread the decision in *O'Connell* v. *Regina*, 11 Clark and F. 155, 8 Eng. Rep. 1061 (see Resp. Br. 24-5, n. 9)[4] just as it has erroneously assumed that petitioner agrees that his sentence was a "general" or a "gross" one (Resp. Br. 21). He did concede that a sentence imposed on multiple counts is inevitably referable in a sense to all of the counts (Pet. Br. 42), but that does not enable an appellate court applying the *Claassen* rule (142 U.S. 140, 146-7) to know how and in what degree it is so referable; and petitioner also noted that here the trial court imposed consecutive sentences on three particular counts "and there is no basis of record for assuming that that arrangement was purely fortuitous" (Pet. Br. 40). On the contrary, an appellate court, having no power to pierce the record or divine the thoughts of the trial judge, ought to assume that the distribution of consecutive sentences was deliberate. And if it was, respondent's own

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[4] Any fair reading of Lord Cottenham's opinion in that case (11 Clark and F. 388-403, 8 Eng. Rep. 1149-54) convinces one that he based his vote on general considerations rather than the particular record before him. Thus, he noted (4 Clark and F. at 402, 8 Eng. Rep. at 1154) that under Lord Mansfield's view a defendant might have no means of securing relief from a bad court or a bad finding: "It is certainly not improbable that it should happen, and it is sufficient that it is possible." It *has* happened here, of course.

Moreover, it is hardly relevant that Sec. 5 of the Statute of 7 Edw. 7, c. 23 changed the rule of the *O'Connell* case, because Sec. 4(3) of that same act gave the Court of Criminal Appeals plenary resentencing power even where the judgment of conviction itself was not appealed. See *Gore* v. *United States*, 357 U.S. 386 at 393.

footnote 8 (Br. 21) concedes that the case must be remanded and the *Claassen* rule cannot be applied.

But it is most revealing to consider the assumptions which the Government must make in order to defend that rule, for those assumptions themselves show the speculative and unfair operation of the rule:

(a) The Government assumes that the trial court's sentence was "gross" (Br. 21), but the very detail and arrangement of the sentence refute that notion. See R. 124-5, 125-6.

(b) Respondent assumes (Br. 22) that the Court of Appeals also viewed the sentence as gross or general, but the phrase "aggregate sentence" as used in that court's opinion (R. 131) is hardly synonymous with those terms; for they have reference to a single punishment allocated to all the counts. But *if* the court below did so view the sentence, it too was merely speculating without sufficient basis in the record before it.

(c) Respondent assumes, evidently along with the court below, that the trial court would have imposed the same punishment on a judgment only two-fifths as large (Br. 26-29). Indeed, it really asks this court to subscribe to the same guesswork and affirm on that basis!

(d) Respondent assumes that petitioner can in any event seek relief under Federal Rule of Criminal Procedure 35 (Br. 29). But he has no real basis for seeking such relief because the Court of Appeals indicated nothing in its affirmance. In the circumstances the rule is useless to petitioner. It might as well not exist.

(e) Lastly, respondent assumes that the trial judge gave more weight to the number of heroin capsules in

the case than to the number of counts (Br. 29-30), but in fact he spoke of both in the same short breath (R. 125). No one other than he can say what he would do if the same case came before him again based on 21 less capsules and 9, or even 13, less counts.

Inevitably the *Claassen* rule leads to this sort of fruitless, demonstrably unwarranted speculation. Inevitably the speculation resolves all doubts against the accused, possibly to his very great injury. There certainly is no question of, or analogy to, mootness (see Resp. Br. 26), for nothing would be more vital to the defendant than the quantum of his punishment.

The opinion of the court below was almost entirely subjunctive. It said no more than that *if* the trial judge would reimpose the same sentence in any event, five valid-but-unspecified counts would support his doing so. But *would* he in fact do so? And what counts *does* the record support? These issues are at the root of the matter for petitioner (as they are for all criminal defendants), and he is entitled to have them fairly and clearly answered. The *Claassen* rule as applied by the court below denied him this right, however.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 134.—October Term, 1958.

William C. Greene, Petitioner, v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January 26, 1959.]

Per Curiam.

Petitioner was convicted in the United States District Court for the District of Columbia on each of 15 counts of an indictment for violations of the narcotic laws,[1] and as recited in the formal judgment was sentenced to imprisonment as follows:

> "Twenty (20) Months to Five (5) Years . . . on Count Two; Twenty (20) Months to Five Years . . . on Count Four, said sentence on Count Four to take effect [at] the expiration of sentence imposed on Count Two; Twenty (20) Months to Five Years . . . on Count Seven, said sentence on Count Seven to take effect at the expiration of sentence imposed on Count Four; Twenty Months to Five Years . . . on each of Counts One, Three, Five, Six, Eight, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen and Fifteen, said sentences by the counts to run concurrently and to run concurrently with the sentences on Counts Two, Four and Seven."

---

[1] The Narcotic Drugs Import and Export Act, § 2 (c), 65 Stat. 767, 21 U. S. C. § 174; the Internal Revenue Code of 1954, §§ 4704 (a), 4705 (a), and 7237 (a), 68A Stat. 550–551, 860, as amended, 69 Stat. 3, 26 U. S. C. (Supp. III) §§ 4704 (a), 4705 (a), 7237 (a).

On his appeal, petitioner sought reversal of the conviction and sentence on each count upon the grounds of prejudicial procedural errors at the trial, insufficiency of the evidence to support the convictions and sentences, and invalid multiple punishments for single offenses. In a *per curiam* opinion the Court of Appeals held that "The record supports at least 5 of the sentences that were to run 'concurrently with' the 3 consecutive sentences. It therefore supports the aggregate sentence. We need not decide whether it suports the 'consecutive' sentences themselves. *Hirabayashi* v. *United States*, 320 U. S. 81, 85; *Wanzer* v. *United States*, 93 U. S. App. D. C. 412, 208 F. 2d 45." It thereupon affirmed, one judge dissenting, 100 U. S. App. D. C. 396, 246 F. 2d 677. Petitioner sought certiorari on the grounds that the sentences invalidly multiply punishments for single offenses, and that the Court of Appeals erred in failing to determine the validity of the several sentences and in holding that imprisonment for an aggregate period of 5 to 15 years is authorized by its finding that "at least 5 of the sentences that were to run 'concurrently with' the 3 consecutive sentences [are valid]." We granted the writ to determine those questions. 357 U. S. 934.

The Government contends here that the several sentences are in reality but one "gross sentence" to imprisonment for a period of 5 to 15 years, and that the holding of the Court of Appeals that at least 5 of the "concurrent" sentences are valid supports the judgment,[2] but it con-

[2] In support of its stated position the Government relies on its understanding of this Court's opinions in *Ex parte De Bara*, 179 U. S. 316, and *Ex parte Henry*, 123 U. S. 372. It also relies upon *Phillips* v. *United States*, 212 F. 2d 327, 335 (C. A. 8th Cir.); *Barnes* v. *United States*, 197 F. 2d 271, 273 (C. A. 8th Cir.); *Levine* v. *Hudspeth*, 127 F. 2d 982, 984 (C. A. 10th Cir.); *McKee* v. *Johnston*, 109 F. 2d 273, 275 (C. A. 9th Cir.); *Jackson* v. *Hudspeth*,

cedes that "If the sentence [may] not be considered as a gross sentence, at least as to the 12 counts which were to be concurrent with 2, 4, and 7, . . . the case would have to be remanded to the Court of Appeals to pass on the validity of counts 2, 4, and 7, [and] if it found any one of them invalid that court would then have to remand to the District Court for resentencing, since, assuming that the other counts cannot be considered in gross, it is not clear which of them, taken individually, were to be concurrent with 2, which with 4, and which with 7."

The question whether, in these circumstances, the law permits the imposition of a single "gross sentence" upon several counts exceeding the maximum sentence that may lawfully be imposed upon any one of such counts is not presented here, for we think the Government's contention that these 15 sentences were, or may be treated as, one "gross sentence" to imprisonment for a period of 5 to 15 years is unsupportable and is contradicted by the plain words of the recorded judgment. "The only sentence known to the law is the judgment entered on the records of the court." *Hill* v. *United States*, 298 U. S. 460, 464. The judgment entered on the records of the court in this case explicitly imposed a separate sentence of from 20 months to the then permissible maximum of 5 years [3] on

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111 F. 2d 128, 129 (C. A. 10th Cir.); *Ross* v. *Hudspeth*, 108 F. 2d 628, 629 (C. A. 10th Cir.); *Hawkins* v. *United States*, 14 F. 2d 596, 597–598 (C. A. 7th Cir.); *Klein* v. *United States*, 14 F. 2d 35, 37 (C. A. 1st Cir.); *Neely et al.* v. *United States*, 2 F. 2d 849, 852 (C. A. 4th Cir.).

[3] At the time of these alleged offenses, and prior to the enactment of the Narcotic Control Act of 1956, 70 Stat. 567, 570, § 2 (c) of the Narcotic Drug Import and Export Act (65 Stat. 767, 21 U. S. C. § 174) provided for imprisonment for its violation of "not less than two or more than five years," and § 7237 (a) of the Internal Revenue Code of 1954 (68A. Stat. 860) provided for imprisonment for the violation or conspiracy to violate §§ 4704 (a) or 4705 (a) of that Code of "not less than 2 or more than 5 years."

each of the 15 counts. It is therefore plain that the court did not impose one "gross sentence" to imprisonment for a period of 5 to 15 years.

The judgment makes the separate sentences on Counts Two, Four, and Seven to run consecutively. Thus, if each is valid, they in sequence authorize imprisonment for an aggregate period of 5 to 15 years. But the judgment makes the separate sentences on the other 12 counts to run concurrently with each other (hence for a total period of 20 months to 5 years) *and* "with the sentences on Counts Two, Four and Seven," without saying whether those "concurrent" sentences are to run with the sentence on Count Two, with the consecutive sentence on Count Four, or with the consecutive sentence on Count Seven. It is therefore evident that the Court of Appeals was in error in concluding that the 5 "concurrent" sentences which it thought were valid alone support an aggregate period of imprisonment of 5 to 15 years.

The rule that reversal is not required if any one of several concurrent sentences is valid and alone supports the sentence and judgment, *Hirabayashi* v. *United States*, 320 U. S. 81, 85, and cases cited; *Pinkerton* v. *United States*, 328 U. S. 640, 642, n. 1; *United States* v. *Sheridan*, 329 U. S. 379, 381; *Roviaro* v. *United States*, 353 U. S. 53, 59, n. 6; *Lawn* v. *United States*, 355 U. S. 339, 359, does not aid the Government, for no one of the "concurrent" sentences, or even all of them together, could, even if geared to a particular (though invalid) consecutive sentence, support imprisonment for more than 20 months to 5 years. If any one of the consecutive sentences on Counts Two, Four or Seven be invalid it cannot be said that such of the "concurrent" sentences as are valid will run with such invalid consecutive sentence, and thus support that much of the aggregate term of imprisonment, because the trial judge did not make the concurrent sentences to run with any particular one of the consecutive

sentences. It is therefore clear, under the present sentences, that imprisonment for an aggregate period of 5 to 15 years can be sustained only if each of the consecutive sentences on Counts Two, Four, and Seven is valid. Hence it is necessary for the Court of Appeals to pass upon the validity of the consecutive sentences. The judgment of the Court of Appeals is vacated and the cause is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.